Contract Formation and the Internet

An analysis of contract formation in English, South African and German law with special regard to the Internet

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DECLARATION

I, the undersigned, hereby declare that the work contained in this thesis is my own original work and that I have not previously in its entirety or in part submitted it at any university for a degree.

Abstract

This dissertation examines the conclusion of contracts on the Internet in English and South African law on the one hand, and German law on the other. Because these legal systems have not developed specific rules for the formation of contracts by way of this medium of communication, the question is whether the traditional doctrines are adequate to the demands of tecnological innovation. The study accordingly proceeds from a detailed discussion of the traditional rules of offer and acceptance developed in each of the systems. To this end, the leading cases and of English and South African law are considered with an emphasis on the points of difference between the approach of the courts in these systems. Where there is uncertainty or different points of view, regard is had to the critical points of view of English and South African commentators. In respect of the codified German civil law, the authoritative provisions of the general part of the civil code are discussed against the background of the commentary of academic authors.

An investigation of the technical structure of the Internet and the various methods of communication afforded by it, provides a foundation for an examination of the application of the general principles of the various legal systems to contract formation on the Internet. It is concluded that despite fundamental differences in the of approach of the systems under consideration, the general principles of each system are capable of application in the context of electronic contracting. The dissertation endeavours to develop proposals regarding adequate solutions to the problems typical of the process of contract formation on the Internet.

Opsomming

Hierdie tesis is afgestem op die hantering van kontraksluiting op die Internet in die Engelse en Suid-Afrikaanse Reg aan die een kant, en die Duitse Reg aan die ander kant. Omrede geeneen van hierdie stelsels tot op hede spesifieke maatreëls daargestel het vir kontraksluiting deur middel van hierdie kommunikasiemiddel nie, is die vraag of tradisionele beginsels afdoende is met die oog op eise van die nuwe tegnologie. Die ondersoek gaan derhalwe uit van 'n behandeling van die tradisionele reëls van aanbod en aanname soos wat dit in elkeen van die stelsels ontwikkel het. Met die oog hierop, word sleutelvonnisse van die Engelse en Suid-Afrikaanse reg ontleed, veral dan ook met klem op verskille in die benadering van die howe in hierdie twee stelsels. In geval van onsekerheid en verskille van mening, word verwys na die kritiese standpunte van Engelse en Suid-Afrikaanse kommentatore. Met verwysing na die gekodifiseerde Duitse stelsel word die gesaghebbende bepalings van die Burgerlike Wetboek behandel teen die agtergrond van die kommentaar van Duitse akademiese skrywers.

'n Ontleding van die tegniese struktuur van die Internet en die verskillende kommunikasiemetodes wat dit bied, verskaf die grondslag vir 'n ondersoek na die toepaslikheid van die algemene beginsels aangaande kontraksluiting van die onderskeie regstelsels in die konteks van elektroniese kontraktering. Die gevolgtrekking is dat ten spyte van fundamentele verskille in benadering, die algemene beginsels van die verkillende stelsels wel aanwendbaar is in die nuwe omgewing. Die verhandeling poog om 'n bydrae te lewer tot die ontwikkeling van aanvaarbare oplossings tot die probleme wat tipies is aan kontraksluiting deur middel van die Internet.

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LIST OF ABBREVIATIONS

AcP	*Archiv der Civilistische Praxis*
BB	*Betriebs- Berater*
CLP	*Computer Law & Practice*
CLSR	*Computer Law & Security Report*
CR	*Computer und Recht*
DB	*Der Betrieb*
DnotZ	*Deutsche Notar Zeitschrift*
Fed Suppl	*Federal Supplement*
Int`l Comp & Comm	*International Company & Commercial Law Review*
Int`l JLInf	*International Journal of Legal Information*
JBL	*Jutas Business Law*
JuS	*Juristische Schulung*
JZ	*Juristische Zeitung*
LQR	*Law Quarterly Review*
MMR	*Multi Media und Recht*
NJW	*Neue Juristische Wochenschrift*
NJW- CoR	*Neue Juristische Wochenschrift - Computerreport*
OJLS	*Oxford Journal of Legal Studies*
RIW/ AWD	*Recht der Internatinalen Wirtschaft/ Außenwirtschaftsdienst des Betriebsberaters*
SAMLJ	*SA Mercantile Law Journal*
SULR	*Southern University Law Review*
TBL	*The Business Lawyer*
Temp Int`l & Comp LJ	*Temple International and Comparative Law Journal*
UMKC	*University of Missouri- Kansas City Law Review*
WLQ	*Washington University Law Quarterly*
ZfRV	*Zeitschrift für Rechtsvergleich*

PART 1: INTRODUCTION

The conclusion of a contract is probably the most common means to structure rights and duties between legal subjects. Contracts are concluded every day at every level of life. The conclusion of contract entails communication between parties, in its simplest form it is established by a conversation between parties in one another's presence. But historically the technical and social development of society has brought about different means for the conclusion of contracts. A new medium of communication and, with it, a new means for the conclusion of contracts has arisen recently in the form of the Internet. The Internet is a medium of communication with a new dimension. It allows the transmission of text and graphics, as well as sound and moving pictures. The Internet offers a completely new range of possibilities for advertising and selling products to companies and private persons. Conventional means of communication with others permit the transmission of pictures, text and sound without interactive communication, as in television or the radio; or enable communication without visible moving pictures as by telephone or fax. In contrast to this, the Internet is a combination of these conventional possibilities. It seems that the Internet will supplant the conventional means more and more. The recent tremendous increase in interest and investment in the Internet has arisen largely as a result of its increasing commercialisation. Numerous transactions in a variety of different businesses are concluded in this global market place every day and it can hardly be estimated what the turnover in money amounts to in these deals. The importance of the Internet to the economy and society is reflected in the following statement:

> "Countries that do not take the time now to create appropriate infrastructures to support the Internet will find their economies plummeting in a matter of years; countries that embrace the Internet will reap the benefits. These infrastructures include telecommunications and education (and even legislation)".

This statement by John Chambers, the president of Cisco Systems Inc.,[1] reveals that the effect of the Internet is not restricted to a special group of persons or occupations, but rather influences the whole society in a number of

[1] Cited in: van der Merwe "Cybercontracts" *JBL Vol 6* (1998) 138.

ways. Chambers furthermore compares the Internet revolution with the industrial revolution, saying that the Internet vision brings people together in global or virtual communities, whilst the industrial revolution brought people and machines together in factories.[2] Like the industrial revolution, the revolution of the Internet has an effect on every part of society, but it has brought about fundamental changes, especially in relation to international commerce, through the fusion of borders that previously existed between companies and customers, sellers and purchasers, and service providers and clients.

The Internet not only enhances the ability of huge companies to contact consumers and to enlarge their sales area, but also enables small companies to trade worldwide. The consumer, on the other hand, also gains advantage from the possibilities provided by the Internet. The first advantage is the lowering of transaction costs, which results from the decrease of costs for catalogues, brochures and their delivery. Hence companies are able to lower the retail price and the consumers get good value for their money. Furthermore, the Internet enables the speeding up of transactions and thus improves the supply for the consumer in two ways. Because of the possibility for smaller companies to offer their products on the Internet, the range of goods for sale increases and the supply of products can be made topical for a specific time and very often without great expenditure.[3] For these reasons e-commerce can be to the advantage of both suppliers and consumers. On the other hand, there are also disadvantages and risks which have to be taken into account while trading on the Internet. The simple case of buying products on the Internet entails the risk of buying rashly. The consumer, furthermore, has no opportunity to inspect the quality of the goods until he has received them, and is therefore saddled with the risk of having to bring a claim for defective performance, a risk exacerbated by dealing with unknown and potentially shady suppliers and the absence of proof of a contract having been concluded. There also is a problem with data protection. Especially where payment is effected by credit card, the consumer

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[2] Van der Merwe "Cybercontracts" *JBL Vol 6* (1998) 138.
[3] Köhler "Die Rechte des Verbrauchers beim Teleshopping (TV-Shopping, Internet-Shopping)" *NJW 98* 185.

cannot be sure that the other party is reliable, or that the data is not intercepted by a third person.[4]

To understand and to discuss the legal problems of the conclusion of contract on the Internet properly, an overview of the basic principles of the formation of contract is required. The thesis reflects these concerns in the three parts that follow:

Part 2 contains a description of the basic principles of the conclusion of contract in English common law. In the case of essential distinctions between South African law and English common law, these distinctions will also be described. The section introduces the principles and problems that concern the conclusion of contract in English common law and South African law. After a summary of the historical development of English common law, the elements of contract will be analysed by means of leading cases and partly by means of criticism by English commentators. In respect of the problems concerning the conclusion of contract on the Internet, the aspects of pre-contractual negotiations (invitation to treat) and the determination of the time and place of contract will be central to the analysis.

Part 3 contains the basic principles of the conclusion of contract in German private law. In contrast to English case law, German private law is a codified legal system based on the German Civil Code. The most important aspect for the conclusion of contract in German civil law is the declaration of intention. This is dealt with in articles §145 BGB (*Bürgerliches Gesetzbuch*) and following. This part of the thesis will proceed to analyse the term ´declaration of intention` and will then describe the different requirements for declarations of intention. Just as in the previous part, the requirement of receipt as set out in §130 BGB will be the main issue in determining the time and place of contract.

In Part 4, the question of the application of the conventional legal rules and initiatives such as the UNCITRAL Model law, the EU-Directive and the ETC (*South African Electronic Communications and Transactions Bill*), for the

[4] Köhler "Teleshopping" *NJW 98* 186.

formation of contract to the conclusion of contract on the Internet is considered. This section will first analyse this matter with regard to English common law in distinction to South African law. The first problem to be discussed is the position in respect to the invitation to treat. This will be done with reference to the most common means of communication on the Internet, namely e-mail messages and web sites. After this, some special forms of agreement on the Internet will be described, before the main problem of the determination of the time and place of contract is analysed. To present this matter clearly, English common law and South African law will be examined separately. Because of the importance of the Internet as a mean of communication, there are rules specifically laid down in this regard. It is therefore necessary to have a closer look at the scope of these initiatives and examine whether the conventional principles concerning the formation of contract could apply. In this respect, the reasons for the existing rules given by the courts will be examined, as well as the explanations and suggestions of English commentators. This part will include proposals for dealing with the existing problems concerning the determination of time and place of contract on the Internet. Finally, the conclusion of contract on the Internet under German civil law and pursuant to the EU-Directive will be analysed. A primary issue is whether statements made by means of the Internet can be characterised as a declaration of intention in the sense of the German Civil Code. Thereafter the rule regarding an *invitatio ad offerendum* in the case of pre-contractual negotiations will be compared to the situation of a communication via web sites and e-mail messages. Lastly, the question of when a receipt can be assumed for the different kinds declaration of intention will be considered. This question is generally subject to §130 I 1 BGB and §147 I 2 BGB, which therefore will be analysed in respect of the Internet-specific circumstances.

PART 2: COMMON LAW

1 Historical Summary

The English common law owes its unique character to its historical development. It therefore is necessary to give a short summary of the historical development and the structure of the common law. A system of central administration of justice has existed in England since the Norman conquest in the year 1066 and it was initially enforced by the royal courts.[5] In the beginning, the courts only dealt with royal matters. The jurisdiction of the courts was expanded gradually through a wider interpretation of the term "interests of the crown", which justified an intrusion on private quarrels.[6] However, because the interests of the crown were synonymous with the public interest, the very notion that the courts were resolving private conflicts hardly existed. The private law and with it the law of contract only came before the courts when the local courts were removed in the 13th century.[7] At this time three forms or writs existed for the commencement of an action. The action of covenant was based on enforcement of a formally sealed promise. The action of debt was focused on compensation and the action of *detinue* was directed at the restitution of movable goods.[8] No action existed which focused on the performance of a contract. It was only with the development of the action of *assumpsit*, in the 16th century, that complete judicial control of the law of contract by the courts was established.[9]

These actions were not precise enough to manage all the different problems resulting from increasing commerce. These problems were resolved by a recourse to royal dispensation.[10] This remedy developed into the so-called equity jurisdiction, which facilitated the realisation of the subjective intentions of

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[5] Curzon *English Legal History* (1968) 16; David/Brierley *Major Legal Systems of the World Today* (1985) 313.
[6] David/ Brierley *Legal Systems* 314.
[7] Manchester *A modern Legal History of England and Wales 1750-1950* (1985) 164-280; Jenks *A Short History of English Law* (1912) 133.
[8] Holdsworth *A History of English Law Vol. II* (1936) 368 and *Vol. III* (1935) 420; Jenks *English Law* 134.
[9] David/ Brierley *Legal Systems* 6.
[10] Hanbury/Maudsley *Modern Equity* (1989) p.5; Blechschmidt "Common Law und Equity im englischen Recht" *ZfRV* 28 (1987) 7.

the parties. With the doctrine of specific performance, for instance, which was based on equity, the parties could take legal action based on the performance of a contract.[11] The legal remedies of the Common law and the Equity jurisdiction were eventually unified from 1873-1875 by the Judicature Acts.[12] The courts at present use both kinds of legal remedies equally, but still distinguish between a judgment at law and a judgement at equity, but in the law of contract especially, both kinds of remedies form part of a unified system.[13]

The basic idea of common law is the certainty of the law.[14] Therefore it is necessary that the law be both clear and ascertainable so as to ensure a uniformity of views as to its substance. With a view to legal certainty, a judge in common law jurisdictions will ask what the established law is in a specific case and not be interested in the question of what justice requires between the litigants.[15] When in doubt the judge will decide in the favour of legal certainty and not in the favour of justice in the individual case.

Whereas the primary source of law in the codified continental-European legal systems is the legislature, the paradigm of the Common law remains the case law and the judiciary. Legal principles are created by a decision of the court which contains a new principle of law (precedent),[16] which binds all courts of an equal or lower status in similar cases and decisions.[17] Statutory law is resorted to only when the case law does not provide a solution.[18] From a historical point of view the law of contract developed within the framework of the particular kinds of contracts, but the modern common law entails a substantial body of rules applicable to all kinds of contracts.[19] The foundation of the law of contract is the freedom of contract.[20]

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[11] Ludwig *Der Vertragsschluß nach UN-Kaufrecht im Spannungsverhältnis von Common Law und Civil Law* (1994) 98.
[12] Walker *The English Legal System* (1976) 72.
[13] Ludwig *Der Vertragsschluß* 99.
[14] Radbruch *Der Geist des englischen Rechts* (1958) 38.
[15] Fikentscher *Methoden des Rechts in vergleichender Darstellung* (1975) 148.
[16] Goodhard "Precedents in English and Continental Law" *LQR* 50 (1934) 40-65; Allen *Law in the making* (1964) p.236; Levi *An Introduction to Legal Reasoning* (1951) 1.
[17] Levi *An Introduction* 1.
[18] Manchester *Legal History* 35.
[19] Treitel *An Outline of the Law of Contract* (1989) 2.
[20] Treitel *The Law of Contract* (1999) 2.

2 Conclusion of contract

2 1 Elements of contract

The elements of contract are the agreement, consideration for the obligation and the intention to create legal relations. An agreement is the necessary requirement to achieve a contract and consists of an offer and acceptance.[21] The objective test is used to ascertain whether an agreement has been made.[22] This legal principle is known as the doctrine of declaratory effect of an act. The essence of this doctrine is reflected by the remark of Chief Justice Brian in the year 1478: "for it is trite learning that the thought of a man is not triable, for the devil himself knows not the thought of a man".[23] As stated in *Paal Wilson & Co. A/S Partenreederei Hannah Blumenthal*[24] it is decisive for English law that the act of one party, objectively considered, constitutes an offer and the other party accepts this offer. It will make no difference if the offeror did not intend to make an offer, or if he misunderstood the acceptance, so that his state of mind is irrelevant. This view of Lord Brightman corresponds with Judge Blackburn's statement in *Smith v Hughes,*[25] and meets with the general approval of most commentators in English common law.[26] Hence an agreement is not a mental state but an act, and as an act it is a matter of inference from conduct.[27] According to this the obligation of the promissor depends on objective criteria indicating that an agreement has been come to to the exclusion of any subjective explanation of the promissor's intention. The crucial factor is the objective meaning of a declaration of intention.[28]

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[21] Atiyah *An Introduction To The Law Of Contract* (1995) 54; Beatson *Ansons`s Law of Contract* (1998) 27. For SA law: *Watermeyer v Murray* 1911 A.D. 61 at 70; *Reid Bros (SA) Ltd. v Fischer Bearings Co. Ltd.* 1943 A.D. 232 at 241; *Estate Breet v Peri-Urban Areas Health Board* 1955 3 SA 523 (A) 532.

[22] *Smith v Hughes* (1871) L.R. 6 Q.B. 597; *Freeman v Cooke* (1848) 2 Exch. 654; *Centrovincial Estates Plc v Merchant Investors Assurance Company Ltd.* (1983) Com L.R. 158 (CA); *Wilson (Paal) & Co A/S v Partenreederei Hannah Blumenthal* [1983] 1 All E.R. 34.

[23] *Year Book Anonym* (1478) Y.B. Pasch. 17 Edw. IV f. 1 pl. 2.

[24] *Wilson (Paal) & Co A/S v Partenreederei Hannah Blumenthal* [1983] 1 All E.R. 55.

[25] *Smith v Hughes* (1871) L.R. 6 Q.B. 597.

[26] Smith *The Law of Contract* (1998) p.12; Beatson *Ansons`s Law* 31; Cheshire/Fifoot and Furmston`s *Law of Contract* (1991) 29.

[27] *Allied Marine Transport Ltd. v Vale do Rio Navegacao, The leonidas D* [1983] 3 All E.R. 737 at 741; *Storer v Manchester City Council* [1974] 3 All E.R. 824.

[28] Beale/Bishop/Furmston *Contract* (1990) 170; Pollock *The Principles of Contract* (1921) 5; Cheshire/Fifoot and Furmston`s *Law of Contract* 29; Smith *The Law of Contract* 12.

In South African law the objective test is also used in order to decide whether an agreement was reached and because such an agreement can only be revealed by external manifestations, one`s approach must of necessity be generally objective.[29] Only the view of Wessels JA in *SAR & H v National Bank of SA Ltd.*[30] has given rise to some controversy. In his judgment he stated that if the minds of the parties do not meet from a philosophical standpoint, but if by their acts their minds seem to have met, the law will look to their acts and assume that their minds did meet.[31] This approach has aroused the criticism that it takes the objective test to absurd lengths because it ignores the minds of both parties and excludes the possibility of taking account of any kind of mistake.[32] The courts have, however, not taken that passage in the decision literally, but used it as a helpful guide in resolving conflicts of evidence on the existence or the terms of a contract.[33]

However, agreement by itself is not sufficient to create a legal contract in English law. A further requirement is either a consideration for an undertaking or a deed (a sealed document) in the form required for particular kinds of contract.[34] This does not currently apply in South African law. The doctrine of consideration was seen as being part of the South African law[35] until its rejection in *Conradie v Rossouw*.[36] The final requirement for a contract to come into existence is the intention to create legal relations i.e. rights and obligations.

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[29] For SA law: *National & Overseas Distributors Corp.oration (Pty.) Ltd. v Potato Board* 1958 2 SA 473 (AD); *Trollip v Jordaan* 1961 1 SA 238 (AD); *Allen v Sixteen Stirling Investments (Pty.) Ltd.* 1974 4 SA 164 (D) 172; *South African Railways & Harbours v National Bank of South Africa Ltd.* 1924 A.D. 704.

[30] For SA law: *South African Railways & Harbours v National Bank of South Africa Ltd.* 1924 A.D. 704.

[31] *South African Railways & Harbours v National Bank of South Africa Ltd.* 1924 Ibid.

[32] For SA law: Kahn *Contract and Mercantile Law* (1988) 17; Kerr *The Principles of The Law of Contract* (1998) 18-19; Hosten *Introduction to South African Law and Legal Theory* (1995) 706; Joubert *General Principles of Contract* (1987) 79.

[33] *National & Overseas Distributors Corp.oration (Pty.) Ltd. v Potato Board* 1958 2 SA 473 (AD); *Trollip v Jordaan* 1961 1 SA 238 (AD); *Allen v Sixteen Stirling Investments (Pty.) Ltd.* 1974 4 SA 164 (D) 172; *South African Railways & Harbours v National Bank of South Africa Ltd.* 1924 A.D. 704.

[34] *Thomas v Thomas* (1842) 2 Q.B. 851 at 859; *Cooke v Oxley* (1790) 3 T.R. 653; *Williams v Roffey Bros. & Nocholls Ltd.* [1991] 1 Q.B. 1 at 19.

[35] For SA law: *Gous v van der Hoff* 1903 20 S.C. 237 at 240.

[36] *Conradie v Rossouw* 1919 A.D. 279.

This entails the willingness of the parties to conclude a binding contract.[37] The intention to create legal relations has a subordinate function in common law. This is the result of the doctrine of declaratory effect of an act, which forms a part of the common law.[38]

Accordingly a binding contract requires at least an agreement and a consideration for the obligation. In *Harvey v Facey*[39] it was said that the most important thing for a contract is the promise, which forms the basis of the agreement. The English literature and the courts often use the term "promise" to define a contract. According to this a contract is a promise or a set of promises for the breach of which the law gives a remedy, or the performance of which the law in some way recognises as a duty.[40] Normally a contract consists of two-sided promises. This means that a promise or a set of promises on one side is exchanged for a promise or a set of promises on the other side. Both parties are equally bound to the performance of their promises, so that these kinds of contracts are called bilateral contracts.[41] In contrast to the bilateral contracts, a unilateral contract entails a promise being exchanged for a performance on the other side amounting to what has been described as an "awkward sort of half-way-house".[42] The distinction between the bilateral and unilateral contract is the absence of a bargain, with the promise being given in view of the performance of the other party.[43]

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[37] *Balfour v Balfour* (1919) 2 K.B. 571; *Rose & Frank Co. v J.R. Crompton & Bros. Ltd.* [1925] A.C. 445; *Edwards v Skyways Ltd.* [1964] 1 W.L.R. 349; *Lambert v Lewis* [1982] A.C. 225; *Hispanica de Petroleos Sa v Vencedora Oceana Navegaceon SA* [1987] 2 Lloyd`s Rep. 323; *Mitsui & Co. Ltd. v Novorossiysk Shipping Co.* [1993] 1 Lloyd`s Rep. 311. For SA law: *Conradie v Roussouw* 1919 A.D.279; *Tobacco Manufactures Committee v Jacob Green and Sons* 1953 3 SA 480 (A) at 492-493; *De Jager v Grunder* 1964 1 SA 446 (A) at 463A-B; *Froman v Robertson* 1971 1 SA 115 (A) at 121D; *Meyer v Kirner* 1974 4 SA 90 (N) at 102D-103A.

[38] Winfield "Some Aspects of Offer and Acceptence" *LQR* 55 (1939) 501.

[39] *Harvey v Facey* [1893] A.C. 552 and also in *Canadian Dyers Association Ltd. v Burton* (1920) 47 O.L.R. 259.

[40] Treitel *Contract* 1; Zweigert/Kötz *Einführung in die Rechtsvergleichung auf dem Gebiet des Privatrechts Band II* (1984) 7.

[41] Atiyah *An introduction* 42; Treitel *An Outline* 10.

[42] *New Zealand Shipping Company Ltd. v A.M. Satterthwaite & Co. Ltd.* [1974] W.L.R. 865; Atiyah *An introduction* 43.

[43] Chitty *On Contracts Vol.I General Principles* 124; Oughton/ Davis *On Contract Law* (1996) 31.

2 1 1 Agreement

2 1 1 1 The Offer

An offer is an expression of willingness to contract on specified terms, made with the intention that it shall become binding as soon as it is accepted by the person to whom it is addressed.[44] Essential rules for an offer were developed in the case *Carlill v. Carbolic Smoke Ball Co Ltd.*[45] The form of expression and the number of recipients are not relevant to the offer. An offer can be directed to one person, a group of persons or to the general public. In this case the requirements of an offer were laid down, more particularly that the offer must be certain and serious.

Courts in common law jurisdictions have often found that an agreement is not binding because the offer was not certain.[46] The wording of the offer should not permit any doubt about the obligation, the price and the identity of the offeror. Indeterminate price clauses were initially handled differently. In a number of cases the courts found that the contract was not effective due to the existence of indeterminate price clauses.[47]

Other courts approved the contract but refused to enforce the claim.[48] The reason for these decisions is that courts do not make contracts for parties. The attitude of the courts to indeterminate price clauses has changed with the increase in trade. In modern common law, contracts without price clauses or containing insufficient price clauses are often approved as effective contracts if

the intention to be bound is clearly discernible and the price is determinable.[49]

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[44] *Storer v Manchester City Council* [1974] 3 All E.R. 824; *First Energy (U.K.) Ltd. v Hungarian International Bank Ltd.* [1993] 2 Lloyd`s Rep. 463.
[45] *Carlill v Carbolic Smoke Ball Co.* (1893) 1 QB 256.
[46] *Hillas & Co. Ltd. v Arcos Ltd.* (1932) 147 L.T. 503; *Scammell & Nephew Ltd. v Ousten* [1941] 1 All E.R. 14; *Kingsley & Keith Ltd. v Glynn Bros. (Chemicals) Ltd.* [1953] 1 Lloyd`s Rep. 21.
[47] *Bishop & Baxter Ltd. v Anglo- Eastern Trading Co.* [1944] K.B. 12; *Love & Stewart Ltd. v Instone & Co.* (1917) 33 T.L.R. 475; *British Electrical, etc. Industries Ltd. v Patley Pressings Ltd.* [1953] 1 W.L.R. 280.
[48] *Scammell & Nephew Ltd. v Ousten* [1941] 1 All E.R. 14; *Jacques v Lloyd D. George & Partners* [1968] 1 W.L.R. 625; *Bushwell Properties Ltd. v Vortex Properties Ltd.* [1976] 1 W.L.R. 591.
[49] *Foley v Classique Coaches Ltd.* [1934] 2 K.B. 1; *Hillas & Co. Ltd. v Arcos Ltd.* (1932) 147 L.T.

2 1 1 1 1 Invitation to treat

An invitation to treat is no offer, but intended to provoke an offer from another party. Hence the need for a clear distinction between an offer and an invitation to treat. The distinction is often hard to draw. A statement is clearly not an offer if its wording negatives the maker`s intention to be bound by the mere acceptance of the other party.[50] Apart from this case the wording is not conclusive, however, because a statement may be an invitation to treat although it contains the word "offer".[51] Conversely, a statement may be an offer although it is expressed to be an "acceptance",[52] or although it requires the person to whom it is addressed to make an "offer".[53] The distinguishing feature between the invitation to do business and an offer is the presence of an intention to be bound.[54] If the first statement was not made with the intention to be bound to a contract as soon as the other person assents to its terms, only an invitation to do business is present, which still requires the acceptance of the other party. That means a response to a prior statement by another party may either constitute acceptance of an offer or the making of an offer which itself may be accepted. But the distinction between an offer and an invitation to treat does not depend entirely on this criterion. Although in certain stereotyped situations, the distinction is determined by rules of law, the decision in the most cases turns on the facts of the particular case.

The rules relating to auctions are interesting as an illustration. A mere advertisement of an auction is not an offer to hold it.[55] At an auction sale the rule is that the auctioneer does not make an offer, which can be accepted by the highest bidder. The offer is made by the bidder which the auctioneer may

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503; *British Bank for Foreign Trade Ltd. v Novinex Ltd.* [1949] 1 K.B. 623; *F & G Sykes Ltd. v Fine Far Ltd.* [1967] 1 Lloyd`s Rep. 53; *Courtney & Fairbairn Ltd. v Tolaini Bros. Ltd.* [1975] 1 W.L.R. 297; *Didymi Corp.n. v Atlantic Lines and Navigation Co. Inc.* [1988] 2 Lloyd`s Rep. 108.

[50] *Financings Ltd. v Stimson* [1962] 1 W.L.R. 1184.

[51] *Spencer v Harding* (1870) L.R. 5 CP 561; *Clifton v Palumbo* [1944] 2 All E.R. 497.

[52] *Bigg v Boyd Gibbins Ltd.* [1971] W.L.R. 913.

[53] *Harvela Investments Ltd. v Royal Trust Co. of Canada (C.I.) Ltd.* [1986] A.C. 207.

[54] *Gibson v Manchester City Council* [1979] 1 All E.R. 972. For SA law: *Rood v Venter* 1903 T.S. 221; *Efroiken v Simon* 1921 C.P.D. 367; *Bird v Summerville* 1960 4 SA 395 (N) 401D; *Brown & Co. v Jacobsen* 1915 O.P.D. 42.

[55] *Harris v Nickerson* (1873) L.R.8 Q.B. 286.

accept or reject.[56] South African Courts distinguish between an auction "without reserve" and an auction in absence of this condition. In the case of an auction without reserve the auctioneer is bound to sell to the highest bidder and has no general discretion to refuse a bid or to withdraw the property from sale.[57] This means that the highest bid concludes the contract, so that the statement of the auctioneer must be regarded as an offer. In absence of the condition "without reserve" the seller retains the right to decide whether to sell or not, so that each bid is an offer which he may accept or not.[58] This case corresponds to English common law and the legal principle of an invitation to treat applies. The same principle applies in the case of a display of goods for sale at a fixed price in a shop window[59] or in a self-service store.[60] The display of goods in a shop window is not an offer, but an invitation to treat. The reasoning behind this rule has been differently expressed by various courts. One argument is given in *Esso Petroleum v Commissioners of Customs & Excise.* [61] In this case it was stated that if the display were regarded as an offer, the shopkeeper might be exposed to many actions for damages if more customers purported to accept than his stock could satisfy.[62] Another reason is given by Winfield, when he mentions that a shop is a place for bargaining, not for compulsory sales.[63] The reasoning for the resort to an invitation to treat in the case of a self-sevice store is different. It is mentioned in *Pharmaceutical Society of GB v Boots Cash Chemists (Southern) Ltd.*[64] that otherwise the customer would be bound to the contract once he placed the article in a receptacle and would have no right, without paying for the first article, to substitute an article which he saw later and which he perhaps preferred.[65] Therefore the contract is not concluded when the

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[56] *Payne v Cave* (1789) 3 Term rep. 148; *Warlow v Harrison* (1859) 1 E & E 309; *British Car Auctions v Wright* [1972] 1 W.L.R. 1519.
[57] For SA law: *De Smidt v Steytler* 1852 1 S. 136; *Municipality of Willowmore v Mathews* 1890 8 S.C. 20; *Versfeld v Terblans* 1922 O.P.D. 9; *Neugebauer & Co. Ltd. v Hermann* 1923 A.D. 564 at 570-1; *Shandel v Jacobs* 1949 1 SA 320 (N) 325-6.
[58] For SA law: *Neugebauer & Co. Ltd. v Hermann* 1923 A.D. 564 at 571; *Afslaers (Edms) SWA Amalgameerde Bpk v Louw* 1956 1 SA 346E.
[59] *Fisher v Bell* [1961] 1 Q.B. 394. For SA law: *Hottentots Holland Motors (Pty.) Ltd. v R* 1956 1 PH. K. 22 (C); *Rood v Venter* 1903 T.S. 221.
[60] *Pharmaceutical Society of GB v Boots Cash Chemists (Southern) Ltd.* [1953] 1 Q.B. 401.
[61] *Esso Petroleum v Commissioners of Customs & Excise* [1976] 1 W.L.R. 1.
[62] *Esso Petroleum v Commissioners of Customs & Excise* [1976] Ibid.
[63] Winfield "Offer and Acceptence" 55 *LQR* 518.
[64] *Pharmaceutical Society of GB v Boots Cash Chemists (Southern) Ltd.* [1953] 1 O.B. 401
[65] *Fisher v Bell* [1961] 1 Q.B. 394.

customer places an article in a receptacle, but when the customer indicates the articles he needs and the shopkeeper accepts this offer.[66]

The point of an invitation to do business in the case of advertisements is the protection of the seller. But a distinction has to be made between bilateral and unilateral contracts.[67] If the advertisment of a seller concerning a bilateral contract were to be classified as offers, every person could conclude a contract by their mere acceptance. The seller would be bound to the contract and the resultant obligations, without having any control over the number of contracts and the contracting parties.[68] The consequence of this is a risk that the seller would be unable to fulfil all obligations, because of the conclusion of a larger number of contracts than anticipated or the exhaustion of stock at that particular moment. In that case a trader would not wish to find himself in breach of a binding contract to supply goods because he has underestimated the demand.[69] This would lead to numerous suits for compensation or at least would damage the reputation of the specific seller. In contrast to this, an advertisement directed at a unilateral contract is treated as an offer.[70] In this case the advertisement does not lead to further bargaining and the advertiser need not assure himself that the other party is able to perform his obligations. The considerations applicable to advertisements directed at bilateral contracts do not apply to the case where the advertisement contemplates a unilateral contract. Hence advertisements in the latter case are commonly held to be offers.

Further examples are invitations to tender and share offers. The statement that goods are to be sold by tender is not normally an offer, so that the person making the statement is not bound to sell to the person making the highest

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[66] *Fisher v Bell* [1961] Ibid.

[67] See *Partridge v Crittenden* [1968] 2 All E.R. 421 for bilateral contracts and see *Carlill v Carbolic Smoke Ball Co.* (1893) 1 Q.B. 256 for unilateral contracts.

[68] *Grainger & Son v Gough* (1896) A.C. 325; *Rooke v Dawson* (1895) 1 CH. 480; *Partridge v Crittenden* [1968] 2 All E.R. 421.

[69] *Grainger & Son v Gough* (1896) A.C. 325.

[70] *Carlill v Carbolic Smoke Ball Co.* (1893) 1 Q.B. 256. For SA law: *Fraser v Frank Johnson & Co.* 1894 11 S.C. 63 66; *Wege v Kemp* 1912 T.P.D. 135 140; *Moodley v Minister of Railways* 1912 N.P.D. 86; *Sephton v American Swiss Watch Co.* 1913 C.P.D. 673; 676; *Bloom v The American Swiss Watch Co.* 1915 A.D. 100 102.

tender.[71] The same rule applies to share offers. A company which offers new shares does not in law offer to allot the shares. This is deemed to be an invitation to the public to apply for them, reserving the right to decide how many to allot to any particular applicant.[72]

2 1 1 1 2 Offers to the public at large

In spite of the requirement of certainty, there is no reason why an offer should not be addressed to an indeterminate group of people or even to the public at large.[73] In this case the offeror indicates his willingness to contract with any member of the public who accepts the offer. But a contractual obligation only comes into existence when an individual person performs the stipulated service.[74] In some cases, such as the offer of a reward for information, the offer is exhausted once accepted, because the offeror does not intend to pay many times over for the same thing.[75] In other cases like the *Carlill v. Smoke Ball Co. Ltd*,[76] the nature of the act required by the offeror and the circumstances in which the offer is made, mean that it remains open for acceptance by any number of persons. The court held in *Carlill v Carbolic Smoke Ball Co. Ltd*[77] that an offer in the form of an advertisement was a case in which there need be no acceptance of the offer other than performance of the conditions and that it was capable of being accepted by a number of persons.[78]

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[71] *Spencer v Harding* (1870) L.R. 5, C.P. 561. For SA law: *National & Overseas Distributors Corp. (Pty.) Ltd. v Potato Board* 1958 2 SA 473 (AD).
[72] *Hebb`s Case* (1867) L.R. 4 Eq. 9; *Wall`s Case* (1872) 42 L.J. Ch. 372.
[73] *Carlill v Carbolic Smoke Ball Co.* (1893) 1 Q.B. 256; *New Zealand Shipping Company Ltd. v A.M. Satterthwaite & Co. Ltd.* [1974] W.L.R. 865; For SA law: *Sephton v American Swiss Watch Co.* 1913 C.P.D. 673; 676; *Lee v American Swiss Watch Co.* 1914 A.D. 121; *Bloom v The American Swiss Watch Co.* 1915 A.D. 100 102.
[74] *New Zealand Shipping Company Ltd. v A.M. Satterthwaite & Co. Ltd.* [1974] W.L.R. 865.
[75] *Lancaster v Walsh* (1838) 4 M. & W. 16.
[76] *Carlill v Carbolic Smoke Ball Co.* (1893) 1 Q.B. 256.
[77] *Carlill v Carbolic Smoke Ball Co.* (1893)Ibid.
[78] *Carlill v Carbolic Smoke Ball Co.* (1893)Ibid.

2 1 1 1 3 Communication of the offer

The offer becomes effective when it is communicated to the offeree.[79] Accordingly an acceptance cannot be done in ignorance of the offer. Only one contrary decision can be found in *Gibbons v Proctor*.[80] In this case the court held that an act could fulfil the requirement of an acceptance before the actor knows about the offer. Some commentators in English common law believe that this decision must be wrong.[81] But a closer look at the reasoning allows also the conclusion that the decision is compatible with the principle of awareness of the offer. The court held in its reasoning that it was important at what time the information reached the final receiver.[82] It is true that the act, the giving of information, was done before the offer was communicated and the offeree aware of it. But the Court in *Gibbons and Proctor* held the time of supply of the information as the decisive factor and at that time the offer was communicated and the original actor aware of it.

According to this it is a general principle that the offer needs to be communicated before it becomes effective. For this reason cross-offers, which may correspond exactly, do not constitute a contract unless one is made with reference to the other.[83] It also explains why even though conduct such as the rendering of services can constitute an offer, there is, as was held in *Taylor v Laird*,[84] no opportunity of rejection and no presumption of acceptance where that offer is not communicated to the party to whom it is intended to be made. An uncommunicated offer does not admit acceptance and cannot give any contractual rights.[85]

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[79] *Taylor v Laird* (1856) 25 L.J. Ex. 329; *Forman & Co. Pty. Ltd. v Ship Liddersdale* [1900] A.C.190. For SA law: *Bloom v The American Swiss Watch Co.* 1915 A.D. 100 102; *George Ruggier & Co. v Brook* 1966 1 SA 17 (N) 22G 24H.
[80] *Gibbons v Proctor* (1891) 64 L.T. 594.
[81] Beatson *Ansons`s Law* 36; Smith & Thomas *A Casebook on Contract* (1992) 37.
[82] *Gibbons v Proctor* (1891) 64 L.T. 594.
[83] *Tinn v Hoffmann & Co.* (1873) 29 L.T. 271.
[84] *Taylor v Laird* (1856) 25 L.J. Ex. 329
[85] *Taylor v Laird* (1856) Ibid.

2 1 1 2 The Acceptance

An acceptance is an unqualified declaration of will from the offeree that the terms of contract as set out in the offer are accepted without them being subject to any reservations, so that consensus is reached.[86] The acceptance is the act that completes the formation of a contract. The objective test applies to the acceptance in the same way as to the offer.[87] This means that the mere acknowledgement of an offer is no acceptance, nor is there an acceptance where the offeree replies to an offer that it is his intention to place an order.[88] In contrast to an offer it is not necessary for the acceptance to contain a promise. An acceptance consists of two elements: It is a statement which completely corresponds to the offer and requires a communication.[89]

2 1 1 2 1 Correspondence to the Offer

The acceptance must correspond to the offer. This means the acceptance must be unconditional and must indicate the willingness to accept the exact terms of the offer.[90] To illustrate: an offer to pay a fixed price for building work cannot be accepted by a promise to do work for a variable price,[91] nor can an offer to supply goods be accepted by a statement for their supply and installation.[92] In English common law this principle of correspondence of offer and acceptance is called "*consensus ad idem*" or the "mirror image rule".[93] An acceptance which contains terms which differ from the offer is not regarded by the law as an acceptance at all. Such a statement can be treated as a counter-offer and requires an acceptance by

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[86] *Holland v Eyre* (1825) 2 Sim. & St. 194; *Harrison v Battye* [1975] W.L.R. 58; For SA law: *Christian v Ries* 1898 13 E.D.C. 8 15; *Joubert v Enslin* 1910 A.D. 6 29.

[87] *Smith v Hughes* (1871) L.R. 6 Q.B. 597; *Freeman v Cooke* (1848) 2 Exch. 654; *Centrovincial Estates Plc v Merchant Investors Assurance Company Ltd.* (1983) Com. L.R. 158 (CA); *Wilson (Paal) & Co A/S v Partenreederei Hannah Blumenthal* [1983] 1 All E.R. 34.

[88] *O.T.M. Ltd. v Hydranautics* [1981] 2 Lloyd`s Rep.211, 214.

[89] Beatson *Anson`s Law* 38, 41; Upex *Davies on Contract* (1991) 13,14.

[90] *Holland v Eyre* (1825) 2 Sim. & St. 194; *Harrison v Battye* [1975] W.L.R. 58; *North West Leicestershire DC v East Midlands Housing Association* [1981] W.L.R. 1396; *Brinkibon Ltd. v Stahag Stahl und Stahlwarenhandel mbH* [1983] 2 A.C. 34. For SA law: *Christian v Ries* 1898 13 E.D.C. 8 15; *Joubert v Enslin* 1910 A.D. 6 29; *Davis and Lewis v Chadwick & Co.* 1911 W.L.D 12 16; *Whittle v Henley* 1924 AD 138 148.

[91] *North West Leicestershire DC v East Midlands Housing Association* [1981] W.L.R. 1396.

[92] *Butler Machine Tool Co. Ltd. v Ex-Cell-O-Corp. (England) Ltd.* [1979] 1 W.L.R. 401.

[93] Halvey/ Masson Halsbury`s *Laws of England Vol IX/ 1* (1998) p.340, 366; Downes *Contract* (1993) 66.

the person who originally made the offer to constitute a contract.[94] A counter-offer amounts to a rejection of the original offer, so that an acceptance of the original offer after the counter-offer is not possible.[95] According to trade practice the parties often add some further remarks or questions to their acceptance. These further remarks or questions can be unimportant or trivial, but according to the "mirror image rule" does not amount to effective acceptance. Such an interpretation of the "mirror image rule" is not suited to the needs of trade. Therefore rules have developed in the English common law to ensure that a discrepancy between an offer and an acceptance will not invariably prevent an effective contract.[96] A counter-offer has to be distinguished from a simple demand relating to elements of the contract. A simple demand is no counter-offer and has no effect on the original offer.[97] The judiciary distinguishes between a counter-offer and a simple demand by asking whether an important part of the contract is unclear, thus necessitating a demand for clarification, or whether a counter-offer has been constituted by the introduction of a condition not contained in the offer.[98] But even in the latter case it is possible to accept an offer provided that the acceptance of the conditions so introduced are at the offeror`s discretion. Should the original offeror reject the new conditions, the acceptance of the original offer remains effective.[99]

An agreement is, as mentioned above, necessary for the establishment of a contract. If for such an agreement the acceptance needs to correspond to the offer and if a meeting of mind of the parties is necessary, it is a logical requirement that an effective acceptance requires the knowledge of the offer.

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[94] *Jones v Daniel* (1894) 2 CH. 332; *Love & Stewart Ltd. v Instone & Co.* (1917) 33 T.L.R. 475; *Lark v Outhwaite* [1991] 2 Lloyd`s Rep. 132 at 139. For SA law: *Jones v Reynolds* 1913 A.D. 366 370-1; *Housten v Bletchly* 1926 E.D.L. 305 309-10; *Harlin Properties (Pty.) Ltd. v Los Angeles Hotel (Pty.) Ltd.* 1962 3 SA 143 (A) 148G-150B.

[95] *Hyde v Wrench* (1840) 3 Beav. 334.

[96] This also applies to SA law: *Slavin`s Packaging Ltd. v Angelo African Shipping Co. Ltd.* 1989 1 SA 337 (W) 339H-341D.

[97] *Stevenson, Jaques & Co. v McLean* (1880) 5 Q.B.D. 346; *Brown & Gracie Ltd. v F.W. Green & Co. (Pty.) Ltd.* [1960] 1 Lloyd`s Rep. 289 at 297.

[98] Halvey/ Masson *Laws of England Vol. IX/ 1* p.409.

[99] *Monrovia Motorship Corp. v Keppel Shipyard (Private) Ltd.* [1983] 1 Lloyd`s Rep. 356.

Until the offeree has received the offer he cannot take any actions in reliance on it and no meeting of minds exists. [100]

Connected to the correspondence of offer and acceptance is the problem of the battle of the forms. In such a case the one party may accept an offer by a confirmation on a form which contains its own standard conditions of trade. These may differ materially from those of the other party. In *British Road Services Ltd. v Arthur V Crutchley & Co. Ltd.*[101] the court held that the last statement, a stamp that contained different terms than the delivery note was a counter-offer, which was accepted by handing over the goods. This means that the last statement that contains the terms and which is not objected to, is the decisive one.[102] This is the so-called "last shot" doctrine. But a modification of this doctrine was effected in *Butler Machine Tool Co. Ltd. v Ex-Cell-O Corp. (England) Ltd.*[103] In this case the two judges[104] used the "classical doctrine". Therefore the last statement was also the decisive factor, but this "last shot" contained the terms of the other party. The additional letter that mentioned that they were entering the order in accordance with their offer was no counter-offer, because the reference in it to the original offer was not for the purpose of reiterating the terms of that offer, but for the purpose of identifying the subject-matter. Lord Denning MR also used this analysis, but preferred the alternative approach of "considering the documents ... as a whole".[105] But according to all three judges the conclusive act was the return of the tear-off slip.

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[100] *Taylor v Allon* [1966] 1 Q.B. 304 at 311; *Tracomin S.A. v Anton C. Nielsen* [1984] 2 Lloyd`s Rep. 195 at 203. For SA law: *Bloom v The American Swiss Watch Co.* 1915 A.D. 100 102; *Kotze v Newmont S.A. Ltd.* 1977 3 SA 368 (NC) 374.

[101] *British Road Services Ltd. v Arthur v Crutchley & Co. Ltd.* [1968] 1 Lloyd´s Rep. 271.

[102] Also in: *Zambia Steel & Building Supplies Ltd. v James Clark & Eaton Ltd.* [1986] 2 Lloyd`s Rep. 225.

[103] *Butler Machine Tool Co. Ltd. v Ex-Cell-O-Corp. (England) Ltd.* [1979] 1 W.L.R. 401.

[104] Lawton L.J.; Bridge L.J.

[105] *Butler Machine Tool Co. Ltd. v Ex-Cell-O-Corp. (England) Ltd.* [1979] 1 W.L.R. 401 at 405.

2 1 1 2 2 Communication of acceptance

An acceptance has no effect until it is communicated to the offeror, so that the contract is incomplete until the offeror receives the acceptance.[106] One therefore has to establish which methods might be used for purposes of acceptance and in respect of each method, when an acceptance is communicated to the offeree.

2 1 1 2 2 1 Method of Acceptance

As it is of interest to the offeror, he is allowed to choose the method of acceptance. He is allowed to indicate the form, fix a time and the place of conclusion or even to dispense with the communication of acceptance.[107] Thus if the offeror asks for an acceptance to be sent to a particular place an acceptance sent elsewhere will not bind him, nor will he be bound if he asks for an acceptance in writing and receives an oral one.[108] If the acceptance does not correspond to the requirements determined by the offeror, the acceptance amounts only to a counter-offer, which has to be accepted by the offeror.[109] An exception to this principle is where the offeror prescribes a method of acceptance for a particular reason. An acceptance that does not conform to the prescribed method but accomplishes the offeror's object as well as the stipulated one, may bind the offeror.[110]

If the offer does not indicate a method of acceptance, it has to be effected in the same way as the offer. It nevertheless seems acceptable to send the acceptance by a means of communication that is as speedy a method as that

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[106] *M`Iver v Richardson* (1813) 1 M. & S. 557; *Mozley v Tinkler* (1835) C.M. & R. 692; *Holwell Securities Ltd. v Hughes* [1974] 1 W.L.R. 155 at 157.

[107] *Manchester Diocesan Council for Education v Commercial & General Investments Ltd.*[1970] 1 W.L.R. 241. For SA law: *Laws v Rutherford* 1924 A.D. 261; *Driftwood Properties (Pty.) Ltd. v McLean* 1971 3 SA 591D; *Westinghouse Brake & Equipment (Pty.) Ltd. v Bilger Engineering (Pty.) Ltd.* 1986 2 SA 555 (A) 573F.

[108] *Financing Ltd. v Stimson* [1962] 1 W.L.R. 1184.

[109] *Wettern Electric Ltd. v Welsh Development Agency* [1983] Q.B. 796.

[110] *Tinn v Hoffmann & Co.* (1873) 29 L.T. 271; *Manchester Diocesan Council for Education v Commercial & General Investments Ltd.*[1970] 1 W.L.R. 241.

used by the offerror. It is absurd to insist on a correspondence of transmission if there is an equal or better method available.[111]

2 1 1 2 2 2 Manifested acceptance

A mental intention to accept will not suffice to constitute a binding contract: there must be an external manifestation of assent and an acceptance has no effect until it is communicated to the offeror.[112] The main reason for this rule is that it could cause hardship to the offeror to be bound without knowing that his offer had been accepted.[113] For this reason there is no acceptance if a person writes his acceptance on a piece of paper which he retains, [114] or where a person decides to accept an offer and instructs his bank to pay, but neither himself or his bank gives notice of this fact to the seller.[115] This means that the communication of acceptance requires the receipt of the declaration, so that the offeror in fact takes note of the acceptance. Such a notification is absent where an oral acceptance is rendered inaudible by an aircraft flying overhead or an acceptance during a telephone call after the line has gone dead,[116] because the offeror does not hear the words of acceptance. A different view was taken in an early South African decision. In *Wolmer v Rees*[117] it was held that there is an acceptance as soon as it is uttered into the telephone, whether the offeror hears it or not. The reasoning was that it is dangerous doctrine if the offeror could say afterwards that he has not heard the acceptance and therefore is not bound to the contract. When this question next arose in South Africa,[118] the court dissented from *Wolmer v Rees* and followed *Entores v Miles Far East Corp.*[119]

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[111] *Tinn v Hoffmann* (1873) Ibid. There is no South African authority on this point, but Christie (p.69) points out that an offer that does not make it unequivocally clear that the prescribed method and no other is to be employed should be given an equitable interpretation to permit acceptance by a method equally advantageous to the offeror. This corresponds to the legal principle in English common law.

[112] *M`Iver v Richardson* (1813) 1 M. & S. 557; *Mozley v Tinkler* (1835) C.M. & R. 692; *Holwell Securities Ltd. v Hughes* [1974] 1 W.L.R. 155 at 157.

[113] *Brogden v Metropolitan Railway Ry.* (1877) 2 App.Cas.666,692; *Brinkibon Ltd. v Stahag Stahl und Stahlwarenhandel mbH* [1983] 2 A.C. 34; *Best`s case* (1865) 2 D.J. & S. 650; *Hebb`s Case* (1867) L.R. 4 Eq. 9.

[114] *Kennedy v Thomasson* [1929] 1 CH. 426.

[115] *Brinkibon Ltd. v Stahag Stahl und Stahlwarenhandel mbH* [1983] 2 A.C. 34.

[116] *Entores v Miles Far East Corp.* [1955] 2 Q.B. 327.

[117] *Wolmer v Rees* 1935 T.P.D. 319.

[118] *S v Henckert* 1981 3 SA 445; (A)*Tel Peda Investigation Bureau (Pty.) Ltd. v Van Zyl* 1965 4 SA 475 (E).

[119] *Entores v Miles Far East Corp.* [1955] 2 Q.B. 327.

and its reasoning, so that the South African law corresponds to the English common law on this point.

The courts in English common law have, however, developed some exceptions to the general rule that the acceptance has no effect until it is communicated to the offeror.

2 1 1 2 2 3 Waiver of communication

In view of the fact that the receipt of an acceptance should protect the offeror, he may
expressly or impliedly waive the need to communicate acceptance.[120] In such circumstances an acceptance may be held effective even though it has not come to the notice of the offeror. Two requirements must be fulfilled. Firstly the offeror has to intimate expressly or impliedly that a particular mode of acceptance, usually consisting of affirmative conduct on part of the offeree will suffice,[121] and the offeree should then evince the intention to accept by acting in conformity with the indication of the offeror.[122] This means that although the offeror does not have to receive the acceptance it is nevertheless necessary that there should be an external manifestation of assent from the offeree. Hence, where an offer to supply goods is made by sending them to the offeree, it may be accepted by simply using the goods,[123] or where an offer to buy goods is made by ordering them, it may sometimes be accepted by their mere dispatch.[124]

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[120] *Weatherby v Banham* (1832) 5 C. & P. 228; *Minories Finance Ltd. v Afribank Nigeria Ltd.* [1995] 1 Lloyd`s Rep. 134 at 140. For SA law: *R v Nel* 1921 A.D. 339; *McKenzie v Farmer`s Co-operative Meat Industries Ltd.* 1922 A.D. 16; *Hersch v Nel* 1948 3 SA 686 (A) 702; *Smeiman v Volkersz* 1954 4 SA 170 (C) 176; *Pretorius v Natal South Sea Investment Trust Ltd.* 1965 3 SA 410 (W) 413G; *Reid v Jeffrey`s Bay Property Holdings (Pty.) Ltd.* 1976 3 SA 134 (C); *Hawkins v Contract Design Center (Pty.) Ltd.* 1983 4 SA 296 (T) at 308C-312C.

[121] *Weatherby v Banham* (1832) ibid; *Manchester Diocesan Council for Education v Commercial & General Investments Ltd.*[1970] 1 W.L.R. 241.

[122] *Manchester Diocesan Council for Education v Commercial & General Investments Ltd.* [1970] Ibid.

[123] *Manchester Diocesan Council for Education v Commercial & General Investments Ltd.* [1970] Ibid.

[124] *Minories Finance Ltd. v Afribank Nigeria Ltd.* [1995] 1 Lloyd`s Rep. 134 at 559; *Port Huron Machinery Co. v Wohlers* (1928) N.M. 843.

2 1 1 2 2 4 Acceptance by Silence or by Conduct

An offeree who does not in respond to an offer is not bound by its terms, so that there can be no acceptance by silence. This rule was laid down in the case of *Felthouse v Bindley*[125] and is based on the idea that a mental intention is not enough to create contracts.[126] Commentators on the English common law have often criticized this decision.[127] It is stated that in this case the offeror waived the requirement of receiving acceptance and the offeree had the intention to accept and acted accordingly to the extent that he instructed the auctioneer to keep the article in question instead of selling it.[128] For this reason the decision in *Felthouse v Bindley* is in the opinion of the commentators hard to support, but there is no criticism of the general rule that silence itself is not binding.

The courts have, however, made some exceptions to this rule. In cases where the offer has been solicited by the offeree and when this offer is in a form which stipulates that silence may amount to an acceptance, it is not unreasonable to acknowledge an acceptance by silence.[129] In this case the argument that the offeree should not be put to the trouble of rejecting loses much of its force.[130] In the case of previous dealings between the parties it seems reasonable to impose on the offeree an obligation to reject the offer, if he has always accepted the offer as a matter of course.[131] There are various instances of true exceptions to the rule that there is no acceptance by silence.[132] Despite these exceptions, the English legislature provided in the Unsolicited Goods and Services Act 1971 that in case of delivery of goods that had not been ordered, these goods represent a donation after a while and silence cannot be dictated as acceptance. In South Africa here is no equivalent legislation, and it might

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[125] *Felthouse v Bindley* (1862) 11 C.B. (N.S.) 869.
[126] Chitty *On Contracts Vol. I* 121; Atiyah *An Introduction*.70.
[127] Beatson *Ansons`s Law of Contract* 49; Atiyah *An introduction* 71; Treitel *Contract* 30.
[128] Ibid.
[129] *Cf. Rust v Abbey Live Ins. Co.* [1979] 2 Lloyd`s Rep. 335.
[130] *Cf. Rust v Abbey Live Ins. Co.* [1979] ibid.
[131] *Cole- McIntyre- Norfleet Co. v Holloway* (1919)141 Tenn. 679, 214 S.W. 87; *Minories Finance Ltd. v Afribank Nigeria Ltd.* [1995] 1 Lloyd`s Rep. 134 at 140.
[132] For exceptions in SA law see: *Commaille v Steyn* 1914 C.P.D. 1100 at 1103; *Benoni Produce and Coal Ltd. v Gundelfinger* 1918 T.P.D. 453; *Benefit Cycle Works v Atmore* 1927 T.P.D. 524 at 530-2; *Seedat v Tucker`s Shoe Co.* 1952 3 SA 513 (T) at 517-8; *Poort Sugar Planters (Pty.) Ltd. v Umfolosi Co-oprative Sugar Planters Ltd.* 1960 1 SA 531 (D) 541; *Resisto Dairy (Pty.) Ltd. v Auto Protection Insurance Co. Ltd.* 1963 1 SA 632 (A) 642 A-G; *Lombard v Pongola Sugar Milling Co. Ltd.* 1963 4 SA 119 (D) 132G-H.

accordingly be necessary to indicate to the sender that no responsibility is accepted for the goods and that these will be treated as abandoned if not collected immediately. If the sender does not collect the goods the recipient has no obligation to pay for them.[133]

Accordingly, a distinction has to be made between the ordinary case of silence in the face of an offer and the exceptional case where it may amount to an acceptance by conduct. If the offeror waives receipt, as mentioned above, it is not necessary that he takes note of the acceptance, because the receipt of acceptance is only used to protect the offeror from being contractually bound without his knowledge, allowing him to relinquish this protection.[134] It is, however, necessary that the acceptance is demonstrated in an objective way.[135] This does not depend on the offeror having knowledge of the acceptance, but entails proof of an unequivocal objective act on part of the offeree to comply with the rule that a mental intention is insufficient to constitute a contract.[136] Acceptance by conduct is therefore not a case of acceptance by silence, but rather an exception to the general requirement of receipt. In some instances the waiver of the receipt of acceptance is inferred, especially in cases of delivery of ordered goods where the acceptance is effected when the offeree puts the goods into use[137] or an offer contained in a request for services can be accepted by beginning to render them.[138]

2 1 1 2 2 5 The "postal rule"

Another exception to the requirement of receipt is a posted acceptance. The general rule is that a postal acceptance takes effect when the letter is posted, whilst an offeror`s letter of revocation to the offeree is effective only on

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[133] *Bellingham & Co. v Smith* (1894) 8 E.D.C. 155.
[134] See part 2 para 2 1 1 2 2 3.
[135] *Harvey v Johnson* [1848] 6 C.B. 305; *Steven v Bromley & Son* [1919] 2 K.B. 722 at 728; *Brogden v Metropolitan Railway Ry.* (1877) 2 App.Cas.666,692.
[136] *The Aramis case* [1989] 1 Lloyd`s Rep. 213 at 234.
[137] Benjamin`s *Sale of Goods* (1998) 147; Chitty *On Contracts Vol. I* 102.
[138] *Minories Finance Ltd. v Afribank Nigeria Ltd.* [1995] 1 Lloyd`s Rep. 134 at 140.

delivery.[139] Therefore the letter has to be in the control of the Post Office or of one of its employees authorised to receive letters.[140] The rule that the contract is complete when the acceptance is posted favours the offeree if the acceptance is lost or delayed by the post.[141] It favours the offeree furthermore by the assymetrical treatment of acceptance and revocation. A posted acceptance prevails over a withdrawal of an offer which was posted before the acceptance but which had not reached the offeree when the acceptance was posted.[142]

This general rule is called the "postal rule" or "mailbox rule" and came into being in the early nineteenth century when commerce was growing and the postal system became more and more important.[143] The problem of a posted acceptance was discussed for the first time in 1818 in the case *Adams v. Lindsell*[144] where the court held that a contract became effective when the letter of acceptance is posted. Exactly the same decision was come to in some cases during the 1840s.[145] The "postal rule" was finally formulated in the *Harris Case* in 1872.[146] A further reason for the rule was given in the case *Henthorn v. Fraser*.[147] In this case the judges emphasized that the offeror must be considered as making the offer all the time that his offer is in the post, and that the agreement between the parties is therefore complete as soon as the acceptance is posted.[148] Another reason can be found in *Household Fire and Carriage Accident Insurance Co. Ltd. v Grant*,[149] where it was sought to eliminate any difficulties by treating the post office as the agent of the offeror not

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[139] *Henthorn v Fraser* [1892] 2 CH. 27at 33; *Adams v Lindsell* (1818) 1 B. & Ald. 681; *Potter v Sander* (1846) 6 Hare 1; *Harris` Case* (1872) L.R. 7 CH. App. 587. For SA law: *Cape Explosives Works Ltd. v South African Oil and Fat Industrie Ltd.* 1921 C.P.D. 244 at 266; *Kergeulen Sealing and Whaling Co. Ltd. v Commissioner of Inland Revenue* 1939 A.D. 487 at 503-5.

[140] *Brinkibon Ltd. v Stahag Stahl und Stahlwarenhandel mbH* [1983] 2 A.C. 34; *Re London & Northern Bank* (1900) 1 Ch. 220.

[141] *Household Fire and Carriage Accident Insurance Co. v Grant* (1879) L.R. 4 Ex. 216; *Dunlop v Higgins* (1848) 1 H.L.C. 381.

[142] *Byrne & Co. v Leon van Tienhoven* (1880) 5 C.P.D. 344; *Henthorn v Fraser* [1892] 2 CH. 27at 33.

[143] Gardner „Trashing with Trollope: A Deconstruction of the Postals Rules in Contract" *OJLS* (1992) 171 and 178; Ludwig *Der Vertragsschluß* 145.

[144] *Adams v Lindsell* (1818) 1 B. & Ald. 681.

[145] *Stocken v Collin* (1841) 7 M. & W. 515; *Potter v Sander* (1846) 6 Hare 1; *Duncan v Topham* (1849) 8 C.B. 225.

[146] *Harris` Case* (1872) L.R. 7 CH. App. 587.

[147] *Henthorn v. Fraser* [1892] 2 CH. 27at 31.

[148] *Henthorn v. Fraser* [1892] Ibid.

[149] *Household Fire and Carriage Accident Insurance Co. v Grant* (1879) L.R. 4 Ex. 216.

only for delivering the offer, but for receiving the notification of its acceptance.[150] There are also difficulties of proof. It is easier to prove that the letter had been posted than to prove that the letter had been received.[151] If it was not for this rule a contract could not be completed by post. The main reason is that if the offeror is not bound by his offer, the offeree ought not to be bound until he had received the notification that the offeror had received his answer and assented to it and so on.[152] To prevent such a vicious circle it is better to assume the binding effect at the moment the letter is posted. Courts used reasoning based on agency and business convenience in the 1880's also to make the distinction between the acceptance and revocations rules.[153] As to agency, it was said in *Byrne & Co. v Leon van Tienhoven & Co.* that the offeror is bound by an acceptance as soon as it is posted because he makes the post office his agent to receive it on his behalf, but that there was no reason to think that the offeree makes the post office his agent for receiving revocation on his behalf, so a revocation will only affect an offeree when he actually receives it.[154] The business convenience is clearly emphazised in the case of *Stevenson, Jaques & Co. v McLean.*[155] There the revocation rule, which acts in favour of the offeree, is calculated as a corrective to the injustice of the rule that an offer for which no consideration has been given may be revoked by the offeror at any time.[156] The idea underlying the revocation aspect of the postal rule is that making acceptance complete at posting rather than delivery at any rate minimizes the window within which such a revocation may take place. Conversely, making the offeror`s revocation ineffective until communicated prolongs the window during which the offeree may accept. The combination of the two rules doubles the effect.[157]

Critical views are articulated by Treitel,[158] Winfield,[159] Pollock,[160] Beatson[161] and Gardner,[162] who refute every argument mentioned above. Firstly they

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[150] *Dunlop v Higgins* (1848) 1 H.L.C. 381; also Alderson in *Stocken v Collin* (1841) 7 M. & W. 515.
[151] See Winfield "Offer and Acceptence" 55 *LQR.* 509.
[152] *Adams v Lindsell* (1818) 1 B. & Ald. 681 at 683.
[153] *Byrne & Co. v Leon van Tienhoven* (1880) 5 C.P.D. 344.
[154] *Byrne & Co. v Leon van Tienhoven* Ibid at 348.
[155] *Stevenson, Jaques & Co. v McLean* (1880) 5 Q.B.D. 346.
[156] See part 2 para 2 1 1 3.
[157] *Stevenson, Jaques & Co. v McLean* (1880) 5 Q.B.D. 346.
[158] Treitel *Contract* 24.

emphasize the realities of trade. According to the normal course of dealing, a confirmation of acceptance is not expected by the parties and therefore no circular argument exists.[163] Treitel states furthermore that the argument that the offeror must be considered as making the offer all the time that his offer is in the post does not explain why posting has any significance at all. Any other proof of intention to accept would also show that the parties were in agreement.[164] Regarding the argument of an easier proof of receipt, Winfield mentions that this depends in each case on the efficiency with which the parties keep records of incoming and outgoing letters.[165] Treitel and Gardner furthermore point out that even if it is possible to regard the post office as an agent of the offeror to carry the letter of acceptance, there is surely no agency to receive it and so conclude a contract on his behalf, which is what would be needed to justify the rule.[166]

Besides this criticism some reasons exist to favour the offeree and therefore the validity of the "postal-rule". First, as mentioned above, the offeror is allowed to choose the means of acceptance. The offeror chooses the post for the transmission himself when he sends the offer by post. He is allowed to choose any form of communication he wants or he can determine that the postal-rule has no effect.[167] If he selects the postal method it is reasonable to place the risk of transmission on the offeror. But it needs to be said that, by using this argument, the offeror is expected to know of the rule so as to make this stipulation. This is not necessarily the case.[168] Secondly, the postal rule can be seen as an arbitrary one.[169] The postal rule is the result of weighing up the situation both of offeror and offeree. Each party may act in reliance on his view of the situation after an acceptance is posted but not received. The offeror may enter into new contracts, believing that his offer had not been accepted. On the other hand the offeree may refrain from entering into other contracts believing

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[159] Winfield "Offer and Acceptence" 55 *L.Q.R.* 509.
[160] Pollock *The Principles of Contract* 556.
[161] Beatson *Ansons`s Law* 44.
[162] Gardner „Trashing with Trollope" *OJLS (1992)* 171 and 178.
[163] Treitel *Contract* 24; Beatson *Ansons`s Law* 25.
[164] Treitel *Contract* 24.
[165] Winfield "Offer and Acceptence" 55 *LQR* 509.
[166] Gardner „Trashing with Trollope" *OJLS* (1992) 173; Treitel *Contract* 24.
[167] *Holwell Securities Ltd. v Hughes* [1974] 1 W.L.R. 155.
[168] Gardner „Trashing with Trollope" *OJLS* (1992) 174.
[169] Treitel *Contract* 24.

that he had accepted the offer. In this situation the English law favours the offeree, because it is the offeror who entrusts his offer to the post.[170] Further, the rule is a pragmatic way of limiting the power to revoke an offer before acceptance.[171] Despite these critical statements, English commentators agree with this argument. For this reason and for the reason that the rule does not really harm anybody, most commentators still accept it. Treitel describes the rule as an arbitrary one, little better or worse than its competitors.[172] Atiyah judges the rule as one that must now be accepted for what it is, no better and no worse than any other solution of a practical problem.[173]

It has been contended that the rule only applies if it is reasonable to use the post for communication, for example where the offer was sent by post, or even though it was transmitted orally, if immediate acceptance was not contemplated and the parties lived at a distance.[174] The rule will in any event not apply where a letter bears a wrong or incomplete address. There is no English authority precisely to point, but English commentators use the case of *Getreide-Import-Gesellschaft v Contimar S.A. Compania Commercial y Maritima*[175] by way of analogy to achieve this result.[176] This means that even if the offeror takes the risk of accidents in the post, it is not reasonable to impose on him the further risk of the offeree`s carelessness.

The postal rule applies also to acceptances by telegram, so that such an acceptance similarly takes effect when the telegram is communicated to a person authorised to receive it for transmission to the addressee.[177] In contrast, the rule is not applied to instantaneous means of communication such as the

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[170] *Household Fire and Carriage Accident Insurance Co. v Grant* (1879) L.R. 4 Ex. 216 at 223.
[171] *Harris` Case* (1872) L.R. 7 CH. App. 587 at 594.
[172] Treitel *Contract* 24.
[173] Atiyah *An introduction* 71.
[174] *Henthorn v Fraser* [1892] 2 CH. 27at 33.
[175] *Getreide-Import-Gesellschaft v Contimar S.A. Compania Commercial y Maritima* [1953] 1 W.L.R.793.
[176] Beatson *Ansons`s Law* 45, Treitel *Contract* 27.
[177] *Stevenson, Jaques & Co. v McLean* (1880) 5 Q.B.D. 346; *Bruner v Moore* (1904) 1 CH. 305. For SA law: *Yates v Dalton* 1938 E.D.L. 177 179-80.

telephone or telex.[178] The reason for this is that it is possible for the offeree to check the receipt of his acceptance without problems or delay. If the conclusion of contract was not successful, he is able to repeat this action immediately.[179] In contrast to this, a person who accepts by letter which goes astray may not know of the loss or delay until it is too late to make the acceptance known. Therefore no reason exists in the case of means of communication like telephone or telex to deviate from the normal rule that an acceptance has to be received by the offeror, if the offeree uses these means of communication.[180]

South African law deviates from the English view of the postal rule in certain respects. In the case of an offer which is made *inter praesentes* and accepted by the mean of post, the postal rule applies under English common law.[181] South African Courts take a different view. In this case the postal rule does not apply, but actual communication of acceptance is necessary to bring a contract into being.[182] In *Smeiman v Volkersz*[183] the judge stated that in the case of an offer verbally made *inter praesentes* the offeror does not impliedly authorise an acceptance to be made by post solely because the parties reside at a distance. South African commentators agree with this point of view.[184] The reasoning is that an offer made *inter praesentes* which needs to be accepted later, from a distance, will frequently be in the form of an option to remain open for a certain time. It is said that it is a much more probable that the parties would regard the end of the fixed period as the time by which the option should be taken up, to the knowledge of the offeror, rather than as the time by which the option should be taken up by letter which might not reach the offeror for several days. The application of the latter case would mean that the option should be taken up not

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[178] *Entores v Miles Far East Corp.* [1955] 2 Q.B. 327; *Brinkibon Ltd. v Stahag Stahl und Stahlwarenhandel mbH* [1983] 2 A.C. 34; *Gill & Duffus Landauer Ltd. v London Export Corp. GmbH* [1982] 2 Lloyd`s Rep. 627.
For SA law: *Tel Peda Investigation Bureau (Pty.) Ltd. v Van Zyl* 1965 4 SA 475 (E); *Odendaal v Norbert* 1973 2 SA 749 (R); *S v Henckert* 1981 3 SA 445 (A) 451B.

[179] *Brinkibon Ltd. v Stahag Stahl und Stahlwarenhandel mbH* [1983] 2 A.C. 34.

[180] *Entores v Miles Far East Corp.* [1955] 2 Q.B. 327; *Brinkibon Ltd. v Stahag Stahl und Stahlwarenhandel mbH* [1983] 2 A.C. 34.

[181] *Henthorn v Fraser* [1892] 2 CH. 27at 33; *Household Fire and Carriage Accident Insurance Co. v Grant* (1879) L.R. 4 Ex. 216.

[182] For SA law: *Bal v van Staden* 1902 T.S. 128 at 135-6; *Botha v Myburg, Krone & Kie Bpk* 1923 C.P.D. 482 at 486.

[183] *Smeiman v Volkersz* 1954 4 SA 170 (C) 176.

[184] For SA law: Kerr *Law of Contract* 120; Christie *Law of Contract* 79; van der Merwe, van Huyssteen, Reinecke, Lubbe, Lotz *Contract General Principles* (1993) 55.

at the determined time, but with the delay of the time a letter posted on the last day of the option might be expected to take in the post. This means that an option which is open until the 20th of a certain month has in fact to be treated as an option open until the 22nd or 23rd of that month.[185] This contradicts the agreement of the parties and the offeror is unable, furthermore, to offer his goods within this additional time because he is not aware of the offeree's action. For this reason the South African law is that the postal rule does not apply to the case of an offer *inter praesentes* accepted by post.

2 1 1 2 3 Revocation of acceptance

The general rule for the communication of acceptance is that the offeror must receive the acceptance and has to take note of it. It follows that an acceptance can be revoked at any time before this occurs, provided that the revocation itself is communicated before the acceptance arrives. But this means also that an acceptance *inter praesentes* is irrevocable once communicated.

In case of a postal acceptance a final problem remains. The offeree may post his acceptance. He may then change his mind and telephone a revocation which reaches the offeror before the letter of acceptance. It could be argued that the acceptance once posted is complete and no revocation possible, because it binds the offeror and should equally bind the offeree.[186] Beatson mentions the point that such a revocation cannot prejudice the offeror, who could not know of the acceptance until it arrived, by which time he would already be aware of the revocation.[187] There is no English authority on this point. In the Scottish case of *Dunmore v Alexander*[188] one judge held that an offeree could not revoke a postal acceptance, but the majority of the court treated the case as one of the revocation of an offer. But this decision is critizised by English commentators as far from conclusive because of the implication of agency and some rather dubious reasoning.[189] It seems reasonable to refuse the possibility of revocation. Otherwise the offeree would

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[185] Ibid.
[186] Upex *Davies on Contract* 20.
[187] Beatson *Ansons`s Law* 51.
[188] *Dunmore v Alexander* (1830) 9 S. 190.
[189] Smith & Thomas *A Casebook on Contract* 51; Pool *Casebook on Contract* (1992) 49.

enjoy both the benefit of certainty in respect of the postal acceptance and the opportunity to revoke it if the offer turned out to be disadvantageous. There is no reason why an offeree who accepts by post should have the opportunity of changing his mind which would not have been available if the contract had been made *inter praesentes*.

It remains to be mentioned, however, that the English legal principle that an acceptance is effective upon the posting the letter of acceptance is not entirely free from doubt in South African law. In *A to Z Bazaars (Pty.) v Minister of Agriculture*[190] it was suggested that it might be open to the offeree to negate an acceptance by means of a telegram which is received before the letter of acceptance reaches its destination.[191] This seems to represent the prevailing opinion of South African Commentators, who mention the criticisms of the postal rules in English, Scottish and American jurisprudence.[192]

2 1 1 3 Termination of the offer

An offer may be terminated by revocation, rejection, lapse of time or death.

Concerning revocation, the general rule of the English common law is that an offer may be revoked at any time before it is accepted.[193] This rule even applies in the case where the offeror promised to keep the offer open for a specified time.[194] The reason for this is that an effective contract requires the existence of the same state of mind between the parties and results in a promise that is supported by consideration. But a promise to sell goods and to keep that offer open until a specific date is gratuitous, and gratuitous promises are not binding owing to the absence of consideration. In English law it is the rule that for a promise to be enforceable, consideration must be furnished by the promisee. As mentioned by James LJ in *Dickinson v Dodds*, if one party offers goods to another party and promises to keep that offer open, but sells the

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[190] *A to Z Bazaars (Pty.) v Minister of Agriculture 1975* 3 SA 468 (A) at 476A-D.
[191] Also Jansen JA referring to the *Cape Explosive* case.
[192] Christie *Law of Contract* 80; Kerr *Law of Contract* 113; Joubert *General Principles* 48; Wessels *Law of Contract in South Africa Vol.1* para 236:
[193] *Payne v Cave* (1789) 3 Term rep. 148; *Routledge v Grant* (1828) 4 Bing. 653; *Offord v Davies* (1862) 12 C.B. 748.
[194] *Dickinson v Dodds* (1876) 2 CH.D. 463; *Routledge v Grant* (1828) ibid.

goods to a third party, the purchase is effective and the offeree cannot claim for damages, because there was no meeting of minds of the first two parties and for this reason no contract.[195] This may change when the offeror`s promise to keep the offer open is supported by consideration. The revocation of an offer needs to be communicated to the offeree.[196] But it is not necessary that this communication is done by the offeror. It is sufficient that the offeree knows from any reliable source that the offeror no longer intends to contract with him.[197]

In South African law the general rule that the offeror may revoke his offer at any time before it has been accepted corresponds to English common law.[198] This revocation becomes also only effective from the moment it comes to the notice of the offeree.[199] A different situation occurs if the offeror promises to keep his offer open. The doctrine of consideration does not apply in South African law.[200] The lack of consideration is the reason why an offer is revocable at any time before acceptance in English common law. In South African law it is possible to enter into an option contract designed to entrench an offer directed at some or other contract between the parties. If the offeror offers to keep the principal offer open and the offeree replies that he accepts this option, the principal offer may not be revoced.[201] Where the contract of option does not specify a time limit, the offer is open for acceptance or rejection for a reasonable time.[202] If the offeree does not reply on the statement to keep the offer open or refuses it, no contract of option is concluded and the offer is revocable at any time before it is accepted.

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[195] *Dickinson v Dodds* (1876) ibid.
[196] *Byrne & Co. v Leon van Tienhoven* (1880) 5 C.P.D. 344; *Dickinson v Dodds* (1876) 2 CH.D. 463.
[197] *Dickinson v Dodds* (1876) ibid.
[198] *Christian v Ries* 1898 13 E.D.C. 8 15; *Gous v van der Hoff* 1903 20 SC 237 at 240; *Scott v Thieme* 1904 21 S.C. 570 577; *Union Government v Wardle* 1945 E.D.L. 177 181; *Greenberg v Wheatcroft* 1950 2 PH. A56; *Stewart v Zagreb Properties (Pyt.) Ltd.* 1971 2 SA 346 (RA) 352.
[199] *Yates v Dalton* 1938 E.D.L. 177.
[200] See part 2 para 2 1.
[201] SA law: *Van Pletsen v Henning* 1913 A.D. 82 98; *Conradie v Roussouw* 1919 A.D. 279; *Laws v Rutherford* 1924 A.D. 261 at 264; *Joubert v Enslin* 1910 A.D. 6 29; *Brandt v Spies* 1960 4 SA 14 (E) 16; *Venter v Birchholtz* 1972 1 SA 276 (A) 283-4; *Wasmuth v Jacobs* 1987 3 SA 629 (SWA) 633D.
[202] *Annamma v Moodley* 1943 A.D. 531 538; *Rose and Rose v Alpha Secretaries Ltd.* 1947 1 SA 35 (W) 38-9; *Wisserkerke v Wisserkerke* 1970 2 SA 550 (A).

The second method of termination of an offer is rejection. In this case the offer can no longer be accepted.[203] A rejection often occurs in case of a counter-offer. If the deviation of an acceptance from the offer is more than a request for information, the original offer is rejected and the acceptance is classified as a counter-offer.[204] There is no English authority on the point whether a rejection needs to be communicated or if posting is sufficient. Most Commentators in English common law state that the rejection also takes effect when it is communicated to the offeree.[205] The reason for this is that the offeree will not act in reliance on the offer as he derives no rights or liabilities from it and the offeror will not know that he is free from his offer until the rejection is actually communicated to him.[206]

An offer is furthermore terminated by lapse of time. An offer expressly stated to be effected for a fixed time only cannot be accepted after that time.[207] If the offeror does not specify any particular time, it is left to the court to determine what is a reasonable time within which an offer may be accepted.[208] Another circumstance resulting in the termination of an offer is the death of the offeree.[209] In principle the death of the offeror has the same effect. The offeree cannot accept the offer after being informed of the death of the offeror.[210] Where the offeree accepts the offer without knowledge of the death of the offeror, the position is less clear. But it is proposed that an offeree who does not know of the offeror`s death should be entitled to accept the offer, unless the offer on its true construction indicates the contrary.[211]

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[203] *Tinn v Hoffmann & Co.* (1873) 29 L.T. 271.
[204] See part 2 para 2 1 1 2 1 supra.
[205] Atiyah *An introduction* 75; Beatson *Ansons`s Law* 59; Treitel *Contract* 41.
[206] Treitel *Contract* 41.
[207] *Dickinson v Dodds* (1876) 2 CH.D. 463. For SA law: *Laws v Rutherford* 1924 A.D. 261; *Landsberger v Vogel & Co.* 1904 T.H. 30; *Scott v Thieme* 1904 21 S.C. 570 at 577.
[208] *Ramsgate Victoria Hotel Co. v Motnefiore* (1866) L.R. 1 Ex. 109. For SA law: *Dietrichsen v Dietrichsen* 1911 T.P.D. 486 496.
[209] *Reynolds v Atherton* (1921) 125 L.T. 690.
[210] *Coulthart v Clementson* (1870) 5 Q.B.D. 42.
[211] *Harris v Fawcett* (1873) L.R.8 Ch. 866 at 869; *Coulthart v Clementson* (1870) ibid. For SA law: *De Kock v Executors of van de Wall* 1899 16 S.C. 463.

2 1 2 Consideration

The second requirement for a binding contract is consideration. In English common law, a promise is not binding as a contract unless it is supported by consideration.[212] Other promises are, as mentioned above, not binding but revocable until their acceptance, even if the promissor intends to bind himself by his promise.[213] The doctrine of consideration is therefore a set of rules which should make it possible for a lawyer to distinguish between gratuitous and non-gratiutous promises.[214] The history of the doctrine has been marked by different definitions, which were often orientated to individual cases. According to one definition, which was developed in 1842, consideration means "something which is of some value in the eye of the law, moving from the plaintiff: it may be some detriment to the plaintiff or some benefit to the defendant, but at all events it must be moving from the plaintiff".[215] In the case *Currie v Misa* a consideration was defined as some right, interest, profit, or benefit accruing to one party, or some forbearance, loss or responsibility, given, suffered or undertaken by the other.[216] Both these and other often used definitions emphasize that something of value must be given, so that a consideration is either some detriment to the promisee or some benefit to the promissor.[217]

The detriment for the one party and the benefit for the other party will ordinarliy correspond with each other. This can be shown by the simple example of the sale of movable goods. The consideration for the sellers promise is the payment of the buyer. On the one hand this is a benefit to the seller and on the other hand it is a detriment to the buyer. The consideration for the promise of the buyer is the delivery by the seller. The delivery is a benefit to the buyer and

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[212] *Cooke v Oxley* (1790) 3 T.R. 653; *Routledge v Grant* (1828) 4 Bing. 653; *Head v Diggon* (1828) 3 M. & Ry. 97.

[213] See part 2 para 2 1 1 3 supra. For SA law: Exception in the case of an additional option contract as stated there.

[214] *Re Cory* (1912) 29 T.L.R. 18; *Williams v Roffey Bros. & Nocholls Ltd.* [1991] 1 Q.B. 1 at 19.

[215] *Thomas v Thomas* (1842) 2 Q.B. 851 at 859.

[216] *Currie v Misa* (1875) L.R. 10 Ex. 153.

[217] Also in: *Barber v Fax* (1682) 2 Wms. Saund. 134, n (e); *Bainbridge v Firmstone* (1838) 8 A. & E. 743, 744; *Argy Trading Development Co Ltd. v Lapid Developments Ltd.* [1977] 1 W.L.R. 385, 391.

a detriment to the seller.[218] In respect of bilateral contracts, the promises are regarded as consideration for each other and it is important that it only refers to the promises itself and not to the contract in general.[219] As a general rule the courts do not ask in respect of consideration whether an adequate value has been given, or if the agreement is harsh or one-sided.[220] If a person decides to pay an enormous price for goods or if he accepts a nominal price, it is his own business and the courts have to respect this.[221] The courts have to decide in every individual case if the consideration has an adequate value in the eye of the law or not.

An important exception to the doctrine of consideration is promissory estoppel. The doctrine of promissory estoppel has the effect that a simple promise to waive performance of a contractual obligation is binding if it is intended to be acted upon, and is in fact acted upon.[222] If the other party acts with confidence in the promise, the promissor will be bound without a consideration.[223] But it should be borne in mind that the promissory estoppel embodies a defence and does not establish a right of action: it is defensive in nature and does not create causes of action where none existed before.[224]

The doctrine of consideration does not apply in South African law.[225]

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[218] Treitel *Contract* 64.
[219] Chitty *On Contracts Vol. I* 171.
[220] *Gaumont- British Pictures Corp. v Alexander* [1936] 2 All E.R. 1686; *Midland Bank & Trust Co. Ltd. v Green* [1981] A.C. 513 at 532.
[221] *High v Brooks* (1840) 10 A. & E. 309 at 320; *Wild v Tucker* [1914] 3 K.B. 36 at 39; *Langdale v Danby* [1982] 1 W.L.R. 1123; *Brady v Brady* 1989 A.C. 755 at 775; *Bolton v Madden* [1873) L.R. 9 QB 55 at 57.
[222] *Hughes v Metropolitan Railway Co.* (1877) 2 App. Cas. 439; *Birmingham and District Land Co. v L. & N.W. Ry.* (1888) 40 Ch. D. 268.
[223] *Combe v Combe* [1951] L.R. 2 K.B. 215, 219.
[224] *Combe v Combe* [1951] Ibid.
[225] See part 2 para 2 1 supra..

2 1 3 Intention to create legal relations and formalities

Besides agreement and consideration, the intention to create legal relations and, in exceptional cases formalities, are required to establish a binding contract.[226]

If the parties formulate their agreement in such a way as to indicate that it should have no legal effect, this will be respected by the courts.[227] Apart from this, an agreement can be so vague that the law refuses to give it any contractual effect.[228] Social and domestic arrangements are not regarded as based on consideration and therefore do not contain an intention to create legal relations.[229] Typical of commercial agreements is that they serve the mutual economic interests of both parties. There is a strong presumption that business or commercial dealings are supposed to have a legal effect, because the mutual promises constitute the consideration as well. If a court ascertains a consideration in a commercial dealing, this consideration indicates in an objective way the intention to create legal relations of both parties.[230]

The term "formalities" was used in the historical development of the common law as a mark of seriousness. A contract under seal, which only becomes effective when the parties observe the formalities, is a contract by deed and therefore a formal contract. In contrast, oral and written contracts are simple contracts and for these contracts the general rule applies that a contract in common law does not require formalities.[231] Contracts can be concluded in

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[226] *Balfour v Balfour* (1919) 2 K.B. 571; *Rose & Frank Co. v J.R. Crompton & Bros. Ltd.* [1925] A.C. 445; *Edwards v Skyways Ltd.* [1964] 1 W.L.R. 349; *Lambert v Lewis* [1982] A.C. 225; *Hispanica de Petroleos Sa v Vencedora Oceana Navegaceon SA* [1987] 2 Lloyd`s Rep. 323; *Mitsui & Co. Ltd. v Novorossiysk Shipping Co.* [1993] 1 Lloyd`s Rep. 311. For SA law: *Conradie v Roussouw* 1919 A.D. 279; *Tobacco Manufactures Committee v Jacob Green and Sons* 1953 3 SA 480 (A) at 492-493; *De Jager v Grunder* 1964 1 SA 446 (A) at 463A-B; *Froman v Robertson* 1971 1 SA 115 (A) at 121D; *Meyer v Kirner* 1974 4 SA 90 (N) at 102D-103A.

[227] *Rose & Frank Co. v J.R. Crompton & Bros. Ltd.* [1925] A.C. 445; *Appleson v Littlewood Ltd.* [1939] 1 All E.R. 464; *Jones v Vernon`s Pools* [1938] 2 All E.R. 626.

[228] *Dimmock v Hallett* (1866) L.R. 2 Ch.App.21..

[229] *Pettit v Pettit* [1970] A.C. 806, 816; cf. *Gould v Gould* [1970] 1 Q.B. 275.

[230] Ludwig *Der Vertragsschluß* 197.

[231] *Beckham v Drake* (1841) 9 M. & W. 79 at 92. This is also the rule in SA law: *Goldblatt v Fremantle* 1920 A.D. 123 at 128; *Menelaou v Gerber and others* 1988 3 SA 342 (T) at 346B.

writing, orally, by conduct or by a combination of these methods.[232] The main area of application for the requirement of writing is the consumer credit agreement. The Consumer Credit Act of 1974 requires such agreements te be signed by the consumer. Furthermore dealings in land must be in writing because of the Law of Property Act of 1925.[233] The written form that is required may differ from case to case. In some acts the size of the contractual document is laid down and for other contracts it is sufficient that something is provable. The consequences of non-observance of the formalities for simple contracts differ from non-compliance in respect of formal contracts. In case of a formal contract the non-observance results in ineffectiveness of the contract, whereas simple contracts are effective but not enforceable by law.[234]

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[232] Atiyah *An introduction* 163; Treitel *Contract* 162; Beatson *Ansons`s Law* 74.
[233] Treitel *Contract* 163.
[234] Pollock *The Principles of Contract* 73.

PART 3: GERMAN LAW

1 The notion of contract

In the German legal system, the notion of a contract is based on the principle of private autonomy. The parties to a contract are able to structure their relationship in the way they want to. The doctrine of private autonomy in relation to contract entails two aspects. Freedom of contract means that a party is at liberty to decide whether to conclude a contract or not and has a free choice in determining the terms of the contract.[235] An exception to this is found in case of an obligation to contract such as exists in relation to the provision of elementary requirements of life.[236] The freedom to contract is also restricted by legal norms under §134 BGB and by the rule concerning good morals of §138 BGB.[237] The second aspect of of the doctrine of private autonomy is that of *pacta sunt servanda*, which entails personal responsibility for undertakings and results in the strict enforcement of contracts.[238]

The BGB does not define the term "contract", but the general principles concerning contracts are laid down in the general part of the BGB (§§145 ff.) as part of the general concept of a legal act (*Rechtsgeschäft*). The prevailing doctrine defines a contract as a correspondence of the intentions of two or more persons concerning the creation of legal consequences between them.[239] For that reason a contract entails at least two declarations of intention that determine the essential components of the contract or make them at least determinable.[240] The decisive factor for a contract is the existence of a normative consensus. Normative consensus is constituted by the external agreement of the parties and does not require that the inner intention of the parties should correspond with the external declaration or declarations. If a contract is concluded, the principle of *pacta sunt servanda* takes effect, so that

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[235] Brox *Allgemeiner Teil* (1998) note 74; Hübner *Allgemeiner Teil* (1985) note 339.
[236] Medicus *Bürgerliches Recht* (1996) note 235; Brox *AT* note 74; Kramer- *Münchener Kommentar* vor § 145 note 10; Hübner *AT* note 546.
[237] Larenz *Allgemeiner Teil* (1989) 41; Brox *AT* note 75.
[238] Hübner *AT* (1985) note 529; Larenz *AT* 49.
[239] Heinrichs- *Palandt (1993)* Einf. v. § 145 note 1; Brox *AT* note 76; Jauernig- *Jauernig* vor § 145 note 3; Kramer- *Münchener Kommentar* vor § 145 note 22, 23.
[240] Jauernig- *Jauernig (1991)* Vor § 145 note 2.

the contract is binding for both parties. The conclusion of contract has to be distinguished from the question as to its validity. The validity of a contract presupposes an agreement but does not concern the formation of contract itself.[241] This means that the question of the validity of the contract arises only once it is certain that an agreement has been concluded. Accordingly the requirements for validity of a contract do not form a part of the subject matter of this thesis.

2 Conclusion of contract

As is the case with the Common law, German law requires an offer and an acceptance for the conclusion of a contract. These declarations of intention can be made in succession or simultaneously. The normal way of concluding a contract is that the parties agree on the content of the contract and set it into operation, ordinarily by signing the agreement.

2 1 The offer

An offer is a declaration of intention which suggests the conclusion of a contract to another party in such a way that the latter only has to approve the offer to establish an agreement.[242] That means an offer is a unilateral, binding declaration, whose operation is dependent on its being received by the addressee and which is aimed at the conclusion of a contract.[243] Because an offer is a declaration of intention, the normal rules relating to this phenomenon applies to the offer. Declarations of intention may be used to establish, to terminate and to change legal relationships between parties. Declarations of intention are the most important means for the creation of legal relationships in the private law of the BGB. It is accordingly necessary to discuss this in more detail.

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[241] Flume *Allgemeiner Teil (1979)* § 2 III c.
[242] Brox *AT* note169.
[243] Enneccerus/ Nipperdey *Allgemeiner Teil (1960)* § 161 986.

2 1 1 Declaration of intention

The term "declaration of intention" was not distinguished from the concept "legal act" (*Rechtsgeschäft*) during the drafting of the BGB. The only indication of its meaning can be found in the statement that "[a] legal transaction, according to the spirit of this law, is a private declaration of intention that aims at the creation of a legal consequence which is determined by law and intended by the parties".[244] The legislature consciously left it up to academic commentators to develop the notion of a declaration of intention.[245] In the nineteenth century the subjective intention of the party was seen as the decisive factor determining the meaning of a declaration.[246] A more recent theory is that because the trust of the addressee is worthy of protection, the objective meaning of a declaration is the decisive determinant of its content. Only adherence to the objective sense of a declaration guarantees the necessary degree of legal security.[247] A further point of view emphasizes the indivisibility of subjective intention and objective meaning, so that a declaration of intention is the actualization of an intention and for this reason binding on the parties.

In the modern literature there is agreement that the legal consequences of a declaration of intention depends on both subjective and objective elements.[248] The prevailing opinion defines a declaration of intention as an expression that reveals the will of a party and aims at legal consequences.[249] According to this it is necessary that the inner intention should concur with the external expression of the party. If there is a discrepancy between these elements, the principles of dissent and mistake apply. The required objective characteristic is the external expression indicating a willingness to enter into commitment. The subjective characteristics are the intention to carry out an action and the awareness of making a legally binding declaration.[250] The intention to reach a

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[244] *Motive I* 126= Mugdan I 421 (own translation).
[245] "Protokoll Nr.22" at: *Achilles I* 130= *Mugdan I* 279.
[246] von Savigny *System des heutigen römischen Rechts part 3 (1840)* § 134 258.
[247] Canaris *Die Vertrauenshaftung im Deutschen Privatrecht (1971)* § 33 412-552 and § 34 424; Dilcher- *Staudinger BGB Kommentar* Vorbem. §§ 116-144 note 44.
[248] Kramer- *Münchener Kommentar 1993)* vor § 116 note 17; Flume *AT* § 4, 5; Schack/ Westermann *Allgemeiner Teil (1991)* 46.
[249] Heinrichs- *Palandt* Einf. v. § 116 note 1.
[250] Brox- *Erman (1993)* Vor. § 116 note 2; Flume *AT* § 4, 2; Enneccerus/ Nipperdey *AT* § 145 II A 896; Hübner *AT* note 378.

specific legal transaction is another subjective characteristic, but it has no effect on the conclusion of the contract. This element can only influence the operation of a concluded contract and is irrelevant to the conclusion of the contract.

A declaration of intention can be made expressly or impliedly.[251] Both types of declarations are provided for by the BGB without their being mentioned specifically. An express declaration can be made orally or in writing and is thus readily discernible. Proving the existence of an implied declaration is more difficult. The prevailing opinion regards a declaration by conduct and by silence as an implied declaration. A declaration by conduct is present where someone conducts himself in a way that indicates a particular intention. In contrast to this, silence is generally not considered as a declaration at all. This is the general rule of the BGB as well as of the "*Handelsgesetzbuch*" (HGB). Only in exceptional cases can a declaration be made by silence. A so-called "eloquent silence" exists if the parties are agreed about the effect of silence as a declaration of intention. Some paragraphs of the BGB and the HGB furthermore, attach importance to silence in cases where somebody who is duty bound to express his contrary intention does not do so. Such an obligation can arise from provisions such as §§416 II 2 and 516 II 2 BGB and §§362 I and 377 II, III HGB. In these cases an eloquent silence is established by operation of law. But an obligation to express the contrary intention can also arise in particular situations on account of the norm of honesty and good faith pursuant to §242 BGB.[252] In the final analysis it has to be taken into consideration that even in these cases silence is no declaration of intention, but merely visited with its legal consequences.[253]

Declarations of intention express the inner intention of a person to the outside world, but this is often done inaccurately and in a way that does not express the inner intention precisely. In case of doubt about the exact content of a declaration it is necessary to interpret it. There are two rules given in the BGB for interpreting a declaration or a contract. According to §133 BGB it is necessary to take have regard to the subjective intention of the party when

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[251] Medicus *AT* § 25 II note 334.
[252] Ludwig *Der Vertragsschluß* 33.
[253] von Thur *Allgemeiner Teil (1914)* § 64 I 534.

interpreting a declaration. In contrast to §133 BGB it is stated in §157 BGB that the interpretation of a contract requires the observance of the general principles of honesty and good faith pursuant to §242 BGB and a consideration of common usage. This means that §157 BGB emphasizes the importance of objective elements for the process of interpretation. Both paragraphs are used together for purposes of interpretation. For this reason, the first guideline for interpretation is to consider the content of the declaration in view of considerations of honesty and good faith and common usage.[254] This objective ascertainment is supplemented by a subjective assessment.[255] The first step in interpretation is therefore to determine the objective meaning of the wording of the declaration whereas as a second step, the circumstances have to be considered to ascertain the meaning of the declaration of intention.

The first requirement for an effective declaration is that it has to be made to the outside world. It should furthermore be given with the knowledge and intention of the declarant under circumstances that render it reasonable to assume that the declaration will be received by the addressee.[256] There is no declaration if these requirements are not met, and a statement does not become effective merely because it happened to reach the addressee.[257]

As regards the moment of efficacy, declarations of intention are classified into two main groups, namely those whose operation depend on their coming to the attention of another, and those whose operation are independent of receipt. Most declarations of intention, and also the offer, belong to the first group and become effective pursuant to §130 I BGB when they reach the addressee. Determination of the moment at which a declaration becomes effective allocates the risk of its proper transmission and the burden of proof in this regard.[258] The allocation of risk in German law is in general based on the locus of control in respect of it. A party who has the greater degree of control over a risk is burdened with it. Even where in the case of a transmission of a declaration of

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[254] Hefermehl- *Soergel BGB Kommentar (1987)* § 133 note 12; Dilcher- *Staudinger* § 133 note 30; Mayer- Maly-*Münchener Kommentar* § 133 note 43; Heinrichs- *Palandt* § 133 note 9; von Thur *AT* § 64 I 539.

[255] Larenz *AT* 342; Mayer- Maly- *Münchener Kommentar* § 133 note 43.

[256] BGH *NJW* 1979 2032; Hübner *AT* note 537; Heinrichs- *Palandt* § 130 note 4.

[257] Larenz *AT* 223.

[258] Flume *AT* § 14,1.

intention no party has more control over the risk than the other, it is still necessary to assign the risk of transmission to one of them.

At the time of the drafting of the BGB four moments were taken into consideration for determining when a declaration would become effective. The moment at which the declaration is made was rejected for it was regarded as unfair to favour the person who made a declaration by placing the risk of transmission on the addressee.[259] To adopt as the decisive moment when the addressee takes note of the declaration, would place the risk on the person who makes a declaration and favour the addressee and was also regarded as an untenable position.[260] The other possibilities were to take as decisive the moment that the person who makes a declaration sends it off, an approach corresponding to the postal rule of the common law,[261] or the moment the declaration reaches the location of the addressee.

The advantage of the last two possibilities are that they restrict the risk to be borne by the relevant party to the actual process of transmission and excludes from it the actions of the parties within their own sphere of influence. Furthermore, they both take into account an objective moment to determine the effectiveness of the declaration. In contrast to the third solution, the fourth concept has the advantage that the moment a declaration reaches the location of the addressee is closer to the moment that the receiver obtains actual knowledge of it, so that it is more reasonable to choose this moment. The last concept also takes into consideration that the person who wants to make a declaration is responsible for it. Because he knows about it and is able to choose a safe means of communication, he is able to control the risk of transmission to a greater extent than the addressee. For these reasons the dratsmen of the BGB chose the moment that the declaration reaches the location of the addressee and enshrined the rule of receipt in §130 BGB.[262]

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[259] *Motive I* 157= *Mugdan I* 438.
[260] *Motive I* ibid.
[261] Noussias *Die Zugangsbedürftigkeit von Mitteilungen nach den Einheitlichen Haager Kaufgesetzen und nach dem UN-Kaufgesetz 1982)* 30.
[262] *Motive I* 157= *Mugdan I* 438.

Paragraph 130 BGB does not define the term "receipt", however. A distinction has to be drawn between receipt by an absent and a present person. Paragraph 130 BGB only applies to a receipt by an absent party. According to the prevailing opinion, receipt in the sense of §130 BGB entails that the declaration reaches the location of the addressee and that he should be able to take notice of the content of the declaration in the normal course of events and that it is reasonable to assume that the declaration would come to the attention of the addressee.[263] Receipt therefore, is a twofold concept. The first element is the possibility that the addressee will take notice of the declarations content in the normal course of events. The addressee is able to take notice of the declaration`s content when the declaration reaches his location and he is able to perceive it. Apart from personal receipt, receipt may also take place when the declaration has reached the mailbox, private bag or answering machine of the addressee.[264] Businesses especially rely on receiving declarations during normal office hours, so that they can guarantee that they are able to receive messages. An addressee who is absent from his normal abode is, however, expected to take precautions, i.e. by nominating a representative for receiving declarations. Should he fail to do so, he will not be entiled to rely on the lateness of a declaration.[265] The second requirement is that it has to be reasonable to assume that the declaration will be attended to by the addressee. There is accordingly no receipt should a declaration reach the addressee at a time when he is not obliged to take note of a message, e.g. during the night.[266] In international trade, messages that are sent off from other countries often reach the addressee after hours because of the time difference. In these cases the time of receipt is postponed to the moment that it is reasonable to assume the addressee`s attention. As an exception, this rule does not apply if the addressee actually takes note of the declaration at an unreasonable time, i.e. if he works after the normal office hours or at night and receives the declaration.

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[263] BGHZ 67 271-279; BGH *NJW* 1983 929-931; Jauernig- *Jauernig* § 130 note 2a; Heinrichs- *Palandt* § 130 note 5; Brox- *Erman* § 130 note 6; Medicus *AT* § 22 III 1 note 273; Enneccerus/ Nipperdey *AT* § 158 II A 1 975; Hübner *AT* note 417.

[264] Heinrichs- *Palandt* § 130 note 5.

[265] Eisenhardt *Allgemeiner Teil* (1989) § 6 75.

[266] Heinrichs- *Palandt* § 130 note 6; Brox- *Erman* § 130 note 7; Larenz *AT* 420.

In such a case it is not necessary to postpone the receipt because the ideal state of affairs for his knowledge is present.[267]

The rule in §130 BGB does not apply to the receipt by a person who is in the presence of the declarant. The risk involved in conveying the declaration is reduced in such cases. However, it is necessary to distinguish between embodied declarations and those that are not. Embodied declarations are received when the addressee is able to take note of the content of the declaration. In the case of a written declaration it is sufficient that the document is handed over.[268] An un-embodied declaration, i.e. one made orally or by conduct, cannot be reproduced after they have been made. The prevailing opinion accordingly assumes the receipt of an un-embodied declaration when the addressee hears the declaration. In contrast to a receipt pursuant to §130 BGB, it is necessary that the addressee actually take note of the declaration.[269] This means that a declaration is not received if it is clearly enunciated, but the addressee does not understand it correctly. This rule is based on the idea that a person who declares something to a person in his presence can ensure that his declaration is understood.[270] Only if the declaration is articulated clearly and it is reasonable to assume that the addressee understood the declaration correctly, will receipt be assumed if the addressee did not indicate his misunderstanding to the declaring person. In this case the addressee is not worthy of protection.[271]

2 1 2 The offer has to be clear and definite

The *essentialia negotii* of the contract envisaged by an offer have to be determined by, or at least be determinable from it. This rule restricts the doctrine of private autonomy by limiting the freedom of the parties to choose the

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[267] Förschler- *Münchener Kommentar* § 130 note 12; Medicus *AT* § 22 III d note 276; Wolf *Allgemeiner Teil (1982)* 337.
[268] RGZ 61 414-416.
[269] Flume *AT* § 14,3; Dilcher- *Staudinger* § 130 note 14; Hübner *AT* note 420; Larenz *AT* 426; Enneccerus/ Nipperdey *AT* § 158 II B 1 981; Wolf *AT* 338.
[270] Ludwig *Der Vertragsschluß* 57.
[271] Larenz *AT* 426; Rüthers *Allgemeiner Teil des BGB (1993)* § 20 II note 273; Köhler *BGB Allgemeiner Teil (1991)* § 13 II 4 a 120; Marburger *BGB Allgemeiner Teil (1987)* 83.

elements of the contract.[272] In international trade open price clauses are often resorted to. Especially in cases where the rapidity of the processing of an order is an imperative, or where reliable business connections exist, the price is often not fully negotiated. Open price clauses may nevertheless satisfy the requirement of certainty and determinability by a resort to §§315-319 BGB. According to §317, the offeror is allowed to fix the price, but has to do so on the basis of a reasonable estimation in terms of §§315 I and 317 I BGB. If the price cannot be determined by using §§315-319 or by an interpretation of the contract in accordance with honesty and good faith pursuant to §242 BGB, the offer does not satisfy the requirement of certainty and cannot form the basis for a contract. The requirement of certainty does not, however, prevent an offer *ad incertam personam,* ie to an inderminate number of recipients.[273]

2 1 3 The binding effect of an offer

An offer has the consequence that the offeror can be bound to a contract as envisaged by his offer by the mere acceptance of the offeree. This aspect distinguishes an offer from non-committal remarks such as those made in the course of preliminary negotiations. The most common non-committal remark is the *invitatio ad offerendum*, a request to somebody else to make an offer, so that maker can decide about an acceptance.[274] In German law, an offer is also binding in the sense that under §145 BGB, an offeror is unable to revoke his offer after the addressee has received it. This provision is designed to facilitate the expeditious conclusion of transactions by affording the addressee certainty as regards the offer and to enable him to arrange his affairs accordingly.[275] To this end, a revocation of the offer after it has reached the offeree is of no effect. This holds an advantage for the offeree. He is able to react to changed circumstances before he decides to accept the offer, while the offeror is bound to his offer. However, this advantage can be restricted by the offeror by the imposition of a short time limit for acceptance. The offeror is furthermore is

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[272] *Motive I* 162= *Mugdan I* 441.
[273] Dilcher- *Staudinger* § 145 note 6.
[274] Kramer- *Münchener Kommentar* § 145 note 8; Heinrichs- *Palandt* § 145 note 2.
[275] *Motive I* 165= *Mugdan I* 836; Rabel *Arbeiten zur Vereinheitlichung des Kaufrechts* (1967) 506.

entitled to exclude the binding effect of the offer.[276] In the absence of such a stipulation, revocation of a binding offer will be effective only with a recourse to §242 BGB, eg where a fundamental change of circumstances occurs and the offeree has been granted a long period for acceptance.[277]

2 1 4 Termination of an offer

According to §148 BGB an offeror may set a deadline for acceptance, so that the offer expires after this moment. Paragraph 146 BGB determines furthermore that an offer expires if the offeree refuses the offer or if acceptance does not take place timeously in accordance with §§147-149 BGB. The refusal of an offer is an unilateral juristic act of the offeree which requires no formalities apart from receipt by the addressee. The relevant declaration of intention can be made explicitly or by conduct.[278] The possibility of an expiry of the offer in consequence of a revocation by of the offeror is not mentioned explicitly. Revocation is a unilateral juristic act which apart from the need for receipt by the offeree, does not require any formalities. The decisive moment for a revocation is the time of receipt of the offer. The offeree has to receive the revocation before or at least at the same time as the offer. An offer that has reached the offeree is irrevocable. The decisive factor is the moment of receipt and not the moment at which the addressee becomes aware of the declaration.[279]

An offer does not expire when the offeror dies or loses his capacity to act. According to §130 II BGB the offeree is still able to conclude a contract if, in spite of the death of the offeror, he accepts. Similarly, pursuant to § 153 BGB, an acceptance does not lose effect if the offeree dies. These rules are based on the idea that a change in the circumstances of a person does not affect a declaration of intention. Such a change will only affect the contract if a personal element is an essential aspect of the contract.[280] In the international trade in

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[276] Larenz *AT* 521; Flume *AT* § 35 I,3d.
[277] BGH *NJW-RR* 1991 311-313.
[278] Jauernig- *Jauernig* § 146 note 1.
[279] Larenz *AT* 425; von Thur *AT* § 61 III 6 448.
[280] Enneccerus/ Nipperdey *AT* § 161 III 2 992; Kramer- *Münchener Kommentar* § 153 note 1; Dilcher- *Staudinger* § 153 note 7.

particular, it has to be borne in mind that companies cannot die. For this reason §§130 II and 153 BGB find analogous application to events coming between the parties before the conclusion of the contract. Especially in case of insolvency, an offer endures and remains open for acceptance by the offeree.[281]

2 2 Acceptance

An acceptance is a declaration of intention that completes the binding effect of the contract leaving both parties to comply with the contractual obligations. An effective acceptance requires a declaration corresponding to the offer which is timeously received by the offeror.

2 2 1 Method of acceptance

An acceptance can be made expressly or by conduct. These are the most common forms of acceptance and are unproblematic. More difficulties arise in respect of the question whether silence can constitute an acceptance. In general, silence does not have legal effect. It is not a declaration of will, and does not entail legal consequences. An exception to this is the "*beredte Schweigen*", which can be legally relevant in consequence of an agreement between the parties or as a result of legal provisions, eg §§362 I HGB and 377 II HGB. In both domestic and international trade, however, cases of "*beredte Schweigen*" not specifically provided for in legislation are of greater relevance in regard to acceptance.

The first such example of „*beredte Schweigen*" is where the silent person would, according to the dictates of honesty and good faith, be obliged to express his contrary intention.[282] Such a situation occurs for example where an acceptance is made and received shortly after the time for acceptance has expired. Because of this slight delay, the offeror will be obliged to indicate that the acceptance is ineffective. This recognition of "*beredte Schweigen*" is based on two different arguments. The first relies on an expanded interpretation of §149 BGB, which establishes that there is an duty to refuse an acceptance if it

[281] Kramer- *Münchener Kommentar* § 153 note 3; Hefermehl- *Erman* § 153 note 5.
[282] BGHZ 1 353 to 356.

is received belatedly. In view of this opinion an analogous application of §149 BGB is indicated if the acceptance is given belatedly, but reaches the addressee soon after the agreed moment of receipt. If the offeror does not express his intention and disregards his duty to do so, the contract will be concluded by the delayed acceptance, because of the offeror`s silence. Another argument in favour of a "*beredte Schweigen*" can be found in §150 BGB. Even if the belated acceptance does not establish the contract but amounts to a new offer, the silence has according to the principle of honesty and good faith to be interpreted as an acceptance of the new offer. Both arguments have in common that they attach importance to the silence as such.

The second example of an "*beredte Schweigen*" is provided by §150 II BGB, where it is provided that any change of the elements of the offer by the acceptance does not result in a binding contract, but contitutes a new offer. This could mean that every departure from an offer, however insignificant, would prevent the conclusion of the contract. This does not correspond to business practice and the needs of trade. For this reason it is accepted that an insignificant change does not prevent the conclusion of a contract unless the offeror signifies his contrary intention. Because of the offeror`s silence, the contract will contain the new element introduced by the acceptance. There is, however, a difference between the case of an insignificant change to the terms of the proposed contract and an insignificant delay in the making and receiving of acceptance. In the case of an amendment of contractual elements by silence it has to be proved in every single case that a "*beredte Schweigen*" is required by the principle of honesty and good faith pursuant to §242 BGB.

An established rule applies to the delivery of goods which were not ordered. The delivery is an offer to conclude a contract. There is no duty on the offeree to express his will in cases like this. His silence has no legal consequence, even if the offeror indicates in the offer that silence will be taken as an acceptance. The offeree is under no obligation to contact the offeror or to

return the goods. A reaction is only required if the offeree utilizes the goods in a manner that could be interpreted as an acceptance.[283]

2 2 2 Waiver of receipt of acceptance

As mentioned above acceptance is may be made expressly or by conduct. Both methods of acceptance require receipt by the offeror. Paragraph 151 BGB establishes an exception to this rule relating to acceptance. According to this, it is not necessary that the acceptance reach the offeror when the offeror has waived the receipt of acceptance or the requirement of receipt would be contrary to common usage. This is the most important exception to the general requirement that declarations should be received in order to be effective.[284] This rule ensures the simplification and speeding up of business transactions, especially in the case of bulk sales.[285] But even if §151 BGB applies, the offeree has to express his acceptance to the outside world, because §151 BGB only does away with the requirement of receipt and not the requirement of a manifestation of assent. The legal nature of such an indication of assent to the outside world is disputed. Some authors deny that it amounts to a declaration of intention, the argument being that a declaration invariably requires receipt. Absent this requirement, the indiation of assent does not qualify as a declaration of intention.[286] The statement is therefore a mere expression of will.[287] In contrast to this, the prevailing opinion classifies this statement as a declaration of intention without the requirement of receipt of the addressee.[288]

Another problem of §151 BGB is the time of conclusion of contract. The wording of §151 BGB determines that a contract is made at the moment of acceptance. An acceptance requires the intention to accept an offer and an expression threof to the outside world. The moment at which the will to accept

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[283] Heinrichs- *Palandt* § 145 note 10; Wessels „Die Zusendung unbestellter Waren" *BB* 1966 432.

[284] Heinrichs- *Palandt* § 151 note 1; Kramer- *Münchener Kommentar* § 151 note 46; Dilcher- *Staudinger* § 151 note 9; Wolf *AT* 384.

[285] Larenz *AT* 531; Köhler *AT* § 15 III 2 159.

[286] Bydlinski „Probleme des Vertragsabschlußes ohne Annahmeerklärung" *Jus* 1988 37.

[287] Hübner *AT* note 542; von Thur *AT* § 62 IV 478; Manigk *Willenserklärung und Willensgeschäft (1907)* 365; Larenz *AT* 655.

[288] BGH *WM* 1977 1014-1022; Jauernig- *Jauernig* § 151 note 1; Hefermehl- *Erman* § 151 note 48; Medicus *AT* § 26 III 2 note 382; Enneccerus/ Nipperdey *AT* § 162 I 2 a 995.

becomes effective is not legally defined. The courts have, however, developed some criteria to ascertain the time of contract. If the offeree utilizes the goods and the resultant intrusion upon the rights of the offeror is irreverseable, a contract has been concluded. In the case of performance or appropriation by the offeree, he has to take unambiguous action in view of his obligation in terms of the contract.[289] This means that the requirements for an acceptance according to §151 BGB are quite high. This is justified by the fact that such an acceptance is not revocable, because the contract is established merely upon the giving of the acceptance to the outside world. There is no time between the giving and the receiving of the acceptance in which the offeree could revoke his declaration of intention.

2 2 3 Time limit for acceptance

Acceptance has to take be made within the time set for it. Pursuant to §147 BGB, a distinction has to be made between acceptance by an absentee offeree and an acceptance by a present person. An offer to a present person must according to §147 I BGB be accepted immediately without any period for reflection being accorded the offeree. However, to determine the time for acceptance it is necessary to take into consideration the extent and the complexity of the contract.[290] If the acceptance is not given in time, the offer expires. It is crucial therefore that offer and acceptance form an integrated whole and part of a direct sequence of events.[291]

An acceptance by an absentee is possible as long as it is reasonable under the normal course of events for the offeror to expect the receipt of the offeree`s acceptance. The offeror determines the deadline for the acceptance.[292] The deadline is mainly determined by the term "under the normal course of events". This is an indefinite concept. Normally it comprises three different moments: the time that it takes to convey the offer, the time to reflect upon the offer and the time that it takes to convey the acceptance. As in the case of an

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[289] Kramer- *Münchener Kommentar* § 151 note 49; Larenz *AT* 531.
[290] Dilcher- *Staudinger* § 147 note 3.
[291] Wolf- *Soergel* § 147 note 2.
[292] *Motive I* 169= *Mugdan I* 445.

acceptance by a present person, the time for reflection depends on the extent and the complexity of the contract. This flexibility in determining a deadline is necessary in view of the requirements of trade. The offeror is furthermore able to fix a deadline for the acceptance or to choose a quick means of communication.[293]

A belated acceptance has no binding effect so that no contract will be concluded if the offeree does not adhere to the deadline. This is laid down by §150 BGB, so that every belated acceptance is a new offer, which can be accepted by the first offeror. In contrast to this, the offeree is entitled to protection according to §149 BGB if it is established that the declaration would have reached the addressee in time if communication had proceeded normally. Accordingly, a declaration given belatedly has to be distinguished from a declaration given timeously but which reaches the addressee after the time limit has expired. In the second case the offeree is allowed to rely on the conclusion of the contract. For this reason §149 BGB is an exception to §150. According to this a declaration which only reaches the addressee after the ascertained date results in a contract and is not a new offer, if the offeror does not refuse the belated acceptance immediately.[294] The time of conclusion of contract is the moment when the offeror receives the belated acceptance.[295] However, if the offeror refuses it immediately, no contract comes about.[296]

2 2 4 Modified acceptance

An acceptance that expands, restrict or changes the offer in any way does not result in a contract. According to §150 II BGB, this acceptance is a new offer. When the original offeror receives such a modified acceptance, his offer expires at the same moment according to §146 BGB. As mentioned above, an exception can be made if the change to the original offer is insignificant and the offeror does not object to it. However, the acceptance normally has to coincide with the offer and to express the intention of the offeree to reach the contract

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[293] Enneccerus/ Nipperdey *AT* § 161 2 b 90.
[294] Kramer- *Münchener Kommentar* § 149 note 1.
[295] *Motive I* 171= *Mugdan I* 446.
[296] Kramer- *Münchener Kommentar* § 149 note 1.

clearly. If there is any doubt whether the offer and acceptance correspond, it is necessary to interpret the declarations by a resort to §§133 and 157 BGB.

2 2 5 Special problems in international trade

The first problem relating to contract formation in international trade is that of different languages. It is necessary to determine which party has to bear the risk of misunderstandings caused by linguistic problems. By using the normal rule about the requirement of receipt, it is reasonable to conclude that a declaration is not received where the addressee is unable to understand the declaration.[297] Another rule has, however, been developed in international trade. Each party is regarded as being responsible for his own understanding.[298] Accordingly, each party has to ensure that they have sufficient command of the language used or to engage a translator if the parties have agreed to a particular language.[299] If one party keeps his linguistic problems from the other by using phrases learnt off by heart, that party cannot rely on non-receipt of the declaration. This rule restricts the principle that a declaration does not reach the addressee if he is unable to understand the declaration.

A second problem in international trade relates to the application of trade customs in respect of the formation of the contract. Paragraph 346 HGB recognizes that trade customs have developed in connection to the conclusion of contracts and especially regarding the content of contract.[300] Trade customs in the sense of §346 HGB are defined as binding rules which are based on the regular, standardized and voluntary undertakings of the affected persons over time.[301] Trade customs apply to traders and also to non-traders which are

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[297] Reinhart „Verwendung fremder Sprachen als Hindernis beim Zustandekommen von Kaufverträgen?" *RIW/ AWD 1977* 20; John „Grundsätzliches zum Wirksamwerden empfangsbedürftiger Willenserklärungen" *AcP 184* (1984) 393.

[298] Sandrock- Beckmann *Handbuch der Internationalen Vertragsgestaltung (1980)* 355; Schlechtriem „Das „Sprachrisiko"- ein neues Problem ?" *Festgabe für Weitnauer* (1980) 133; Reinhardt „Zum Sprachproblem im grenzüberschreitenden Handelsverkehr" *IPRax* 1982 228.

[299] Hefermehl- *Erman* § 2 *AGBG* note 7.

[300] Capelle/ Canaris *Handelsrecht* § 22 VI 1 244.

[301] BGH *WM* 1984 1000-1003; Hefermehl- *Schlegelberger* HGB § 346 note 8.

involved in trade like traders.[302] In German law, trade customs are valid even if one party has no knowledge of a particular custom or does not want to be bound by it. This means that a party has to exclude the use of a special trade custom if he does not want it to form part of the contract.[303] This is especially problematic in international trade. A foreigner may often be wholly unaware of domestic trade customs. In order to determine whether a trade custom applies, a rule has developed in international trade that the main geographical emphasis of the contract is the decisive factor. That means for instance that a French buyer has to take the German trade customs into consideration if he concludes a contract in Germany.[304]

The most important trade custom concerns the so-called commercial letter of confirmation. In one opinion this legal institution is based on a trade custom according to §346 HGB.[305] Another opinion is that it is based on customary law.[306] Both opinions agree that the rules regarding the commercial letter of confirmation apply in current law. [307] The commercial letter of confirmation has to be distinguished from the confirmation of an order. The ordinary confirmation of an order completes the negotiations between the parties. Accordingly, the confirmation of an order does not represent the result of negotiations but constitutes a normal acceptance of an offer. That means a confirmation of an order has constitutive effect on the contract. In contrast to this, the commercial letter of confirmation assumes that a contract is already concluded.[308] A commercial letter of confirmation is a document sent to clarify the content of the contract arrived at by negotiations between parties who are traders or are involved in trade like traders. A distinction has to be made between a declarative and constitutive commercial letter of confirmation. A declarative commercial letter of confirmation corresponds to the actual content of the previously concluded contract,[309] and has no effect on the conclusion of

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[302] Capelle/ Canaris *Handelsrecht* § 22 VI 2 246.
[303] Hefermehl- *Schlegelberger HGB* § 346 note 31; Baumbach/ Duden/ Hopt *HGB (1989)* § 346 note 1d.
[304] Capelle/ Canaris *Handelsrecht* § 22 VI 1 244.
[305] Capelle/ Canaris *Handelsrecht* § 23 II 1 250.
[306] Larenz *AT* 646; Heinrichs- *Palandt* § 148 note 8; Gernhuber *Bürgerliches Recht (1991)* 7.
[307] Schmidt *Handelsrecht* (1987) § 18 III 1 b 497.
[308] Capelle/ Canaris *Handelsrecht* § 23 III 2 262.
[309] Jauernig- *Jauernig* § 147 note 2; Kramer- *Münchener Kommentar* § 151 note 29; Baumbach/ Duden/ Hopt *HGB* § 346 note 3 A b; Schmidt *Handelsrecht* § 18 III 3 505.

contract. The constitutive commercial letter of confirmation on the other hand, comes to the fore when the negotiations between the parties are not completed, but the parties want the contract to be concluded or when the result of the negotiations and therefore the content of the contract is not clear or when the commercial letter of confirmation effects a change to the orally concluded contract.[310] In the case of a constitutive commercial letter of confirmation silence will be legally relevant. If the negotiations are not completed, silence following a commercial letter of confirmation will conclude the contract. Where an orally concluded contract is varied by the letter, a failure to respond will lead to a contract on the terms of the letter of confirmation.[311] The rules in this regard do not apply, however, if the amendment to the orally concluded contract is material and an acceptance by the addressee could not reasonably have been expected.[312]

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[310] Kramer- *Münchener Kommentar* § 151 note 29; Diederichsen „Der Vertragsschluß durch kaufmännisches Bestätigungsschreiben" *JuS* 1966 130.

[311] BGHZ 7 187-194; Hefermehl- *Erman* § 147 note 6; Baumbach/ Duden/ Hopt *HGB* § 346 note 3 A b; Flume *AT* § 36,3.

[312] Capelle/ Canaris *Handelsrecht* § 23 II 3 255; Ulmer/ Brander/ Hensen *AGB Gesetz (1993)* § 2 note 89.

PART 4: CONCLUSION OF CONTRACT ON THE INTERNET

The overview of the basic principles of contract formation in different legal systems provides a basis for an analysis of their application to the conclusion of a contract on the Internet. A summary of the historical development of the Internet and its technical features as a medium of communication will provide a better understanding of the legal problems of contract formation by this means.

1 The development of the Internet

Ironically, the Internet, which now arguably does more to promote cultural understanding than any previous technological innovation, came into being as a result of the tensions caused by the Cold War.[313] During the 1960's, an American Cold War think-tank called the RAND Corporation, focused their attention on how the United States authorities could successfully communicate in the event of a nuclear war.[314] Their proposal was to create a network of "high-speed supercomputers" that would have no central authority, with each computer equal in status to the others, so that each could create, pass and receive messages.[315] Even if large chunks of this network were to be destroyed, messages would simply take an alternate route through the network in order to reach their destinations.[316] Although the first such network was initially tested at the National Physical Laboratory in Great Britain, the first permanent network of this type was set up at UCLA in the United States in 1969.[317] This network originally connected four universities and enabled scientists to share information and resources across long distances. This initiative was funded by the Pentagon's Advanced Research Projects Agency,

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[313] Smith/ Macdonald/ Graham „Doing Business on the Internet: The legal issues" *CLSR* Vol. 12 (1996) 202.
[314] www.rand.org/publications; www.pbs.org/obp/nerds/2.0.1/networking_ners/coldwar.
[315] v. Reno „American Civil Liberties Union" 929 *Fed Suppl* (1996) 831
[316] Ibid; Gringras *The Laws of the Internet* (1997) 2.
[317] Schurtz-Taylor „The Internet Experience and Authors Rights" *Int`l JLInf* Vol. 24 (1996) 116; www.pbs.org/opb/nerds2.0.1/networking_nerds/fournodes.

and hence the network was called ARPANET.[318] In the following period new and smaller networks, which connected different universities, arose. These networks, i.e. BITNET, CSNET, FIDONET and USENET, were linked up among themselves and connected to the ARPANET. By 1972, there were 37 computers operating in ARPANET.[319]

The network continued to grow throughout the seventies. Innumerable new networks arose towards the end of the 1970's and during the following decade. To enable the connected computers to communicate for purposes of data interchange, a uniform encoding system was necessary, and to this end a system, the "Transmission Control Protocol/ Internet Protocol" (TCP/IP) was developed.[320] The TCP/IP suite of networking protocols, or rules, became the only set of protocols used on the ARPANET.[321] Every computer that was connected to the ARPANET was able to link to the others by means of this standard method of transmission, which is still widely used today. This decision set a standard for other networks, which also adopted TCP/IP as the standard method of transmission.[322] Only a resort to this standard method for data interchange merits the use of the term "Internet" as the network of networks which either use the TCP/IP protocols or are able to interact with TCP/IP networks. The Internet has right from the beginning been not a single network, but the complex set of all networks which use the TCP/IP for data interchange and which is therefore called the network of networks.[323]

To keep military and non-military network sites separate, the ARPANET split into two networks: MILNET and ARPANET.[324] The non- military site ARPANET, or now called the Internet, was the starting point of a civilian computer network. In 1982 and 1983, the first personal desktop computers began to appear. Many were equipped with an operating system called Berkeley UNIX, which includes

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[318] v. Reno „ACLU" 929 *Fed. Suppl.* (1996) 831
[319] Schurtz- Taylor „The Internet Experience" *Int`l JLInf* Vol. 24 (1996) 116; v. Reno Ibid.
[320] Smith *Internet and Law Regulation* (1999) 1.
[321] Terret *A Lawyers Introduction to the Internet* (1997) 16.
[322] Davies "Contract Formation on the Internet Shattering a few myths" *Law and the Internet* (1997) 100; Terret *A Lawyers Introduction* 16.
[323] Smith *Internet Law* 1; Van der Merwe *Computers and the Law* (2000) XIV; Kass „Regulation and the Internet" *SULR* Vol. 26 No. 1 (1998) 95; v. Reno „ACLU" 929 *Fed Suppl.* (1996) 831.
[324] www.isoc.org/internet/history/brief; www.forthnet.gr/forthnet/isoc/short.history.of.internet.

networking software.[325] In late 1983, the TCP/IP was installed into the UNIX operating system.[326] Because of its simplicity the Internet gained in popularity. As from the personal computer revolution in the 1980's, the expansion of the Internet was unstoppable. During the late 1980's the population of Internet users and network constituents expanded internationally and began to include commercial facilities. By the end of 1991, the Internet had grown to include some 5,000 networks in over three dozen countries, serving over 700,000 host computers used by over 4,000,000 people. The present number of Internet users can hardly be estimated because of its decentralised administration.[327] During 1997 the number of users increased from 20 to 40 million people and this number should double annually.[328] The estimated number of users in the year 2000 was over 200 million.[329]

2 The technique of the Internet

The Internet is not a net in a physical sense of wires, transmitters and transceivers that have been laid down and constructed to establish the Internet. Instead of specially developed equipment, the Internet uses the existing infrastructure of telephone, satellite and fibre cable networks for data interchange.[330] As mentioned above,[331] the basis for a smoothly operating data interchange system is TCP/IP as the standard method of transmission. The TCP/IP allows a computer to communicate using two techniques. Firstly the TCP/IP slices the data information into small packets.[332] This digital data is stored and handled as strings of zeroes and ones which are called bits.[333] These bits are transmitted to the receiving computer across the Internet, which entails the copying of data packets from one computer to another. The TCP/IP

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[325] www.pbs.org/opb/nerds2.0.1/timeline/80s; www.bell-labs.com/user/zhwang/vcerf.
[326] www.zakon.org/robert/internet/timeline; www.bell-labs.com/user/zhwang/vcerf.
[327] Schurtz-Taylor „The Internet Experience" *Int`l JLInf* 114.
[328] Kuhn "A Dilemma in Cyberspace and Beyond: Copyright Law for Intellectual Property Disributed Over the Information Superhighway of Today and Tomorrow" *10 Temp Int`l & Comp LJ* 1996 171 (175); International Working Group on Data Protection in Telecommunications *DuD* 1997 154
[329] v. Reno „ACLU" 929 *Fed Suppl* (1996) 824; Lawson The Complete Internet Handbook for Lawyres (1999) 16.
[330] Schurtz-Taylor „The Internet Experience" *Int`l LJInf* 115.
[331] See part 4 para 1.
[332] Schurtz-Taylor „The Internet Experience" *Int`l LJInf* 114.
[333] Schurzt-Taylor Ibid; Gringras *Laws of the Internet* 1.

secondly controls the mechanism to direct the data packets correctly.[334] Each computer that is connected to the Internet has a special ID-number indicating the network the computer is attached to.[335] The TCP/IP adds the ID-number of the dispatching and the receiving computer to every data packet. On their way the data packets pass other computers. By way of the standardized transmission method the data packets are led through these computers to their final destination.[336] The data packets are completely independent of each other and are able to take totally different paths to their destination.[337] If information was sent from Cape Town to Berlin, one packet could take a path via New York and Amsterdam to Berlin, whereas another data packet could take a path via Nairobi and Prague to Berlin. These packets are re-assembled to form the original information at the receiving computer.[338]

Because of its nature, the Internet itself cannot provide any services or information. Only users are able to provide these things across the Internet. The connection to the Internet is organised by an Internet Service Provider, i.e. Xsi-net or Commundo, or an Online Service Provider like Telkom or American Online (AOL). Internet Service Providers only connect people to the Internet, whereas Online Service Providers offer additional services such as electronic-mail or discussion groups. The two most used services on the Internet are e-mail and the World Wide Web. These are furthermore the two services users are likely to use to enter into agreements. The World Wide Web was introduced to the world in January 1992 at CERN, the European Laboratory for Particle Physics.[339] The World Wide Web has been one of Internet's most important recent developments. It uses the HyperText Markup Language (HTML) and HyperText Transfer Protocol (HTTP).[340] HTTP allows clients to call up and request documents, while HTML describes how to display the elements, eg graphics, images, moving videos or links to other web sites and so on, of a

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[334] Schurzt-Taylor „The Internet Experience" *Int`l JLInf* 114
[335] Gringras *Laws of the Internet* 3.
[336] Kass „Regulation and the Internet" *SULR* Vol 26 (1998) 96.
[337] Schurtz-Taylor „The Internet Experience" *Int`l JLInf* 114; v. Reno „ACLU" 929 *Fed Suppl* (1996) 831.
[338] v. Reno Ibid.
[339] v. Reno Ibid at 836.
[340] Schurtz-Taylor „The Internet Experience" *Int`l JLInf* 116; Davies *Contract Formation on the Internet* 103.

HyperText Web site.[341] This enables users to construct web sites for advertising products or services, and to place an icon on their web sites which automatically sends an e-mail to the owner of the web site. This is the most common way commercial web sites offer goods and services to users. Data packets from the World Wide Web are transmitted in the same way as mentioned above. In order to provide an uncomplicated and user-friendly service, every IP-number is attached to a certain name. These specific names allow Internet users to find certain web sites easily without using complicated IP-numbers.[342] The name of a person, organisation or business is followed by the country-code eg ".za" for South Africa or ".de" for Germany. A lot of commercial web sites do not use their country code, but the code "com" for "commercial" because of their international field of activity which is not restricted to domestic borders.[343] This use of the name of the user followed by its country- or net-code guarantees a high degree of practicality for using and searching Internet addresses and web sites.

The second important medium for trading on the Internet is the e-mail system. An e-mail message that is created by the sender is transmitted in the form of data packets just like other information on the Internet. But there is a difference between e-mail and other data. "Normal" data packets are dispatched from the sender`s computer and is received by the addressee`s computer, even if they pass a number of other computers. If a sender creates an e-mail message, these data packets are mostly sent to his own mail server. This mail server can store or queue the message before sending it on its way to the recipient`s mail-server.[344] The recipient`s mail-server stores the message until the client retrieves the message from his mail-server or until it is erased to make space for new messages. The sender`s mail-server as well as the recipient`s mail-server can run on their own computer, but very often Internet users make use of an e-mail provider (like hotmail or firemail) or an online provider (like Telkom or

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[341] Schurzt-Taylor Ibid; Davies Ibid; Gussis „Website development agreements: a guide to planning and drafting" *WLQ* Vol. 76 No. 2 (1998) 726.
[342] Schurtz-Taylor Ibid.
[343] Turner/ Brennan „Commercial Lawyers`guide to the Internet" *Int`l Comp & Comm* Vol 8 (1997) 120,121.
[344] Davies *Contract Formation on the Internet* 102.

AOL) for their e-mails.[345] This means that the mail-server does not run on the individual computer, but on the service computer of the provider and because the Internet is not restricted by geographical borders, it does not matter where these servers are located. The e-mail client can retrieve the message from his mail-server anywhere and at any time, but this requires an e-mail address chosen by the user. Basically e-mail addresses originate from the same procedure as the addresses of web sites. The client chooses an e-mail provider, eg hotmail, and selects his preferred mail name eg "student". The mail provider hotmail chose the code "com" for its business. The client "student" uses the hotmail service computer as his mail-server.[346] Therefore his e-mail address would be student@hotmail.com.

3 Conclusion of contract on the Internet under different legal systems

The following part deals with the formation of contract on the Internet under the legal systems previously discussed considering initiatives as the UNCITRAL Model Law, the EU-Directive and the ETC. The English common law system will be examined first. In the case of deviations of South African law from the English common law, it will also be considered separately. Thereafter the application of the rules of German law will be examined. The requirements necessary for an effective contract in e-commerce as well as the extent to which the initiatives and the existing rules of each legal system are applicable to the formation of contract on the Internet will be examined.

3 1 English Common law and South African law

The elements of a contract in English common law are an agreement between two or more persons, the obligation and the intention to create legal relations.[347] An internet or online contract is defined as a contract concluded wholly or in part through communications over computer networks, by e-mail, through web sites, via electronic data interchange and other electronic combinations.[348]

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[345] Davies Ibid.
[346] Smith *Internet Law* 3; Gringras *Laws of the Internet* 5.
[347] See part 2 para 2 1 supra.
[348] Smedinghoff *Online Law: The SPA's legal guide to doing business on the Internet* (1996) 79; Gringras *Laws of the Internet* 14; Smith *Internet Law* 208.

Contracts concluded over the Internet usually fall into three broad categories.[349] Firstly there is the sale of physical goods, which mostly arise when a web site on the Internet is used as a modern kind of shop window (cyber shopping malls) for the sale of physical goods.[350] These retail purchases are the most common kind of Internet-based transactions. The second category is the contract for the supply of digitised products. This kind of contract includes the commercial trade of data like software or multimedia products, often coinciding with the granting of a licence of any copyright material comprised within the products.[351] The last category is the supply of services and facilities. These contracts include individual services on the Internet like on-line banking, video-conferencing or the giving of professional advice over the Internet.[352] Most of these contracts are formed between businesses and consumers, rather than between businesses themselves, and are simple retail purchases made through cyber shopping malls or other forms of offer on the Internet.

3 1 1 Offer and acceptance by electronic means

The exchange of offer and acceptance by electronic means is a reasonably new method of concluding a contract. It should be noted that commercial law has traditionally lagged behind new commercial practices.[353] Some specific regimes, however, have been created to cater to e-commerce. The EU-Directive is binding for the member states and the English common law therefore needs to correspond to Art.9, 10, 11 of the EU-Directive concerning the conclusion of contract on the Internet. However, the Directive contents only a general regulation on contract formation. In Art. 9 it is stated that the member states shall ensure that their legal system allows contracts to be conducted by electronic means. The English common law creates no obstacles for the use of electronic means in contract formation. Of greater concern are Art. 10 and 11 of the EU-Directive. While Art. 10 EU-Directive stipulates that the supplier is obliged to determine the method of contract formation, Art. 11 EU-Directive

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[349] Smith *Internet Law* 208; Smedinghoff *Online Law* 80. For SA law: Van der Merwe "Cybercontracts" *JBL Vol. 6* (1998) 138.
[350] Smedinghoff *Online Law* 80.
[351] Smith *Internet Law* 208.
[352] Smith Ibid.
[353] Muller "Selected Developments in the Law of Cyberspace Payment`s" 54 *TBL* (1998) 403 at 413.

deals with the requirements of placing an order on web sites. This special case will be discussed in order to establish its effect on time and place of contracting. As no general rule for the method of contract formation can be found in the EU-Directive, the problem has to be solved by the law of the individual EU member states. In principle, the basic rules of contract law apply to contracts created electronically. What needs to be considered is whether the inherently complicated rules regarding the formation of contract, which originated at a time when electronic means of communication did not exist, can adequately accommodate the newer forms of communication, which were not strictly codified by the EU-Directive.

3 1 1 1 Offer

First, it will be discussed whether the basic rules concerning offer and acceptance apply to the formation of contract by electronic means. An offer is a communication by a person of the terms on which he is prepared to be bound on the acceptance of those terms by the person to whom the communication is addressed, who by signifying his acceptance of the terms, establishes the contract.[354] A general principle is that an offer must produce certain and unambiguous terms.[355] There is no need to deviate from this principle in respect of an offer on the Internet, so that declarations made by this means fall to be evaluated by the criteria applicable to offers made in a conventional way. As mentioned above, an offer needs to be distinguished from an invitation to treat,[356] and in respect of communication by means of web sites and e-mail messages it will have to evaluated whether a statement is merely an invitation to treat or an offer capable of acceptance. Also to be considered is the issue of an offer to the public at large and the revocation and lapsing of an offer.

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[354] See part 2 para 2 1 1 1 supra.
[355] *Hillas & Co. Ltd. v Arcos Ltd.* (1932) 147 L.T. 503 further *Scammell & Nephew Ltd. v Ousten* [1941] 1 All E.R. 14.
[356] See part 2 para 2 1 1 1 1 supra.

3 1 1 1 1 Invitation to treat

As mentioned above, an invitation to treat is no offer but intended to elicit an offer from another party.[357] The distinguishing feature between an offer and an invitation to treat is the presence of an intention to be bound or the certainty of terms and the classification of any given statement depends on the circumstances of the particular case.[358] This essential distinction also needs to be made with regard to statements on the Internet, because commercial web sites and cyber shopping malls could be viewed as essentially similar to shop windows or advertisements. Communication by means of an e-mail message on the other hand corresponds more closely to conventional postal communication. The invitation to do business will therefore have to be analysed with reference to web sites and e-mail messages, the two most important means available for contracting on the Internet:

3 1 1 1 1 1 Web sites

The classification of a statement on a web site as on offer or an invitation to treat can for the English common law be derived from Art. 11 of the EU-Directive. In principle, the EU-Directive abstained from prescribing a theory of contract formation. In Art 10 of the Directive it is settled that the supplier of goods and services over the Internet is obliged to inform the client of the precise method of contract formation. The EU-Directive further stipulates in Art. 11 that the supplier needs to send an acknowledgement of receipt of any order to the client. In case of contract formation by the mere acceptance by the addressee of a declaration of will, the declarer might well be embarrassed by an enormous number of contracts or a shortage of stock at that particular moment. The risk might be even higher on the Internet than in a normal shopping situation because of the borderless and decentralised structure of the Internet. The number of users of the Internet can hardly be estimated, but it is presumed to be more than 200 million. For this reason and because of the obligation to send an acknowledgement of receipt of the order, the supplier would be well advised to stipulate that a contract comes into force when his acknowledgement of

[357] Ibid.
[358] Ibid.

receipt of the order reaches the client. It seems reasonable therefore, to presume that the contract will in most cases be concluded not by the order of the client, but rather by the acknowledgement of receipt of an order. For this reason, it seems probable that most statements on web sites will function as invitations to treat because of the disadvantages of concluding a binding contract by mere mouse click acceptance by the client.

According to Art. 27 (1) ETC this acknowledgement of receipt is not necessary in South African law, and the conventional rules are therefore applicable as this matter is not mentioned in the ETC. The publication of an advertisement offering goods for sale at a stated price is not an offer to everyone who may read the advertisement. It is merely an invitation to potential customers to make an offer for the advertised products or services, an offer that the vendor may decide to accept or reject.[359] There are grounds for the assumption that the display of goods on a web site may similarly be regarded as an invitation to do business. This conclusion is strengthened if regard is had to the structuring of advertising or supplying web sites such as http://mall.mweb.co.za, which, like other web sites, are built up like a shopping mall, full of different kinds of shops offering a variety of goods. Every shop displays its goods in a virtual shop window that can be built up on the screen.

However, these superficial correspondences to traditional forms of advertising or the supply of goods do not *per se* make an electronic display into an invitation to treat. The reasoning of the leading cases needs to be taken into account. The reason why the display of goods for sale at a fixed price in a shop window is merely an invitation to treat and not an offer, is given in *Esso Petroleum v Commissioners of Customs & Excise.*[360] Here it is mentioned that if the display were regarded as an offer, a shopkeeper might be exposed to many actions for damages if more customers purported to accept than his stock could satisfy. This reasoning could apply to the display of goods on a screen via the Internet as well. The question that has to be answered also in South African law therefore is, whether the owner of a web site, who advertises or supplies goods, wants to be bound by the acceptance of everybody who learns

[359] *Bird v Sumerville* 1960 4 SA 395 (N) 401D; *Crawley v Rex* 1909 T.S. 1105.
[360] *Esso Petroleum v Commissioners of Customs & Excise* [1976] 1 W.L.R. 1.

about his statement or whether he is provoking others to make an offer that he can decide to accept or refuse. As mentioned above, the Internet is a borderless medium that connects people all around the world. Because of the incredible number of users and potential customers, a salesman does not want to be bound by every acceptance on his statement. Otherwise he might be held liable to fulfil all obligations, because of the enormous number of contracts or a shortage of stock at the particular moment. For this reason especially, the seller on the Internet does not wish to find himself in breach of a binding contract to supply goods where he has underestimated the demand.[361] These reasons support the idea that the advertisement or the offer to supply over the Internet is an invitation to treat.

Furthermore there is another consideration in South African law that substantiates this point of view. The Internet does not allow a personal meeting of the seller and purchaser. The seller does not know with whom he is concluding the contract. This imports uncertainty regarding the trustworthiness or the ability to pay of the purchaser. The courts have established that the offer has to be a firm offer and have held that it is often essential for the seller to gain knowledge about eg the financial standing of the other party before exposing himself to an instant contract by making an offer.[362] In these cases, it is stated that there is no foundation for assuming an intention to be bound without knowledge about the financial standing of the other party. But these cases have been decided on the facts and the circumstances of the specific case. On the basis of these cases it is furthermore the law that the application of the distinction between an offer and an invitation to treat depends wholly on the facts and the circumstances of the case. It should nevertheless be emphasized that because of its structure, the Internet does not permit a personal meeting of the seller and the purchaser at any time. For that reason alone, the seller will generally never be informed about the financial standing of the other party, so that there is some basis for holding that the statement of the seller on the Internet will generally not amount to an offer. But this reasoning is only applicable to larger transactions. The reason for this qualification is that payment for purchases on the Internet is in most cases effected by credit card.

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[361] Smith *Internet Law* 209; Reed *Internet Law* 176.
[362] *Efroiken v Simon* 1921 C.P.D. 367; *Crawley v Rex* 1909 T.S. 1105.

In the case of a small transaction, which does not exceed a certain amount, the bank of the buyer guarantees the payment. This means that it is not important for the seller to be aware of the financial standing of the purchaser. In the case of bigger transactions, however, this factor will have to be taken into account.

There are, however, some grounds for treating an advertisement on the Internet as an offer rather than an invitation to treat in specific cases. The nature of the product, eg software or digitised goods, might be relevant. These goods can be reproduced as often as required, so that a shortage of stock is hardly conceivable. The original software exists on the seller`s computer (server) and will be copied to the purchaser`s computer (client). This kind of "delivery" over the Internet is called "downloading" and can be repeated as often as required. The argument that the seller does not have the intention to be bound by the acceptance of the purchaser because of an eventual shortage of his stock seems to be irrelevant for determining the seller`s intention in this kind of case. This reasoning applies not only to contracts for the supply of digitised products, but also to other instances of the supply of services and facilities where a shortage of supply is not a practical possibility either. Accordingly, advertisements on web sites offering goods should amount to an invitation to treat, in the absence of any other unambiguous indication. In the case of the supply of digitised goods or service and facilities, the intention of the seller has to be analysed more carefully because of the nature of the situation.

The second reason why an advertising campaign on the Internet could be characterised as entailing an offer and not an invitation to treat, is the decision in *Carlill v. Carbolic Smoke Ball Company Ltd*[363], which is also taken in South African law. In this case an advertisment made in the course of a sales campaign directed at the public, was held to entail an offer and not merely an invitation to treat. The decisive dictum in this case is:

> "It is an offer made to all the world; and why should not an offer be made to all the world which may ripen into a contract with anybody who comes forward and performs the condition. The contract is made with the limited portion of the

[363] The reasoning in SA cases is similar: *Fraser v Frank Johnson & Co.* 1894 11 S.C. 63 66; *Bloom v The American Swiss Watch Co.* 1915 AD 100 102 and *Lee v American Swiss Watch Co.* 1914 A.D. 121.

> public who comes forward and performs the condition on the faith of the advertisement." [364]

According to this, a campaign on the Internet, which is also directed to the whole world, could perfectly well be characterised as an offer. But the reasoning behind this judgement shows differences between this case and a campaign on the Internet. The Carbolic Smoke Ball Company limited its offer to a class of people, and furthermore a contract would only have been concluded if one person of this group performed the condition indicated in the offer. This means that the Carbolic Smoke Ball Company restricted its offer to those people who performed the condition and did not set out an offer to the whole world in the usual sense. Because of its limited application the campaign of the Carbolic Smoke Ball Company was therefore not an offer which could lead to a binding contract by mere indication of assent. By contrast, a statement on the Internet is directed to an uncertain number of people and more often than not it does not require the fulfilment of any condition. It does not therefore avoid the problem of a vast number of contracts. This constitutes a decisive difference from the advertisement of the Carbolic Smoke Ball Company, so that the fact that the advertisement that was treated as an offer in this case cannot be extended to a campaign on the Internet. An advertisement on the Internet will therefore not inevitably constitute an offer.

The conclusion that can be drawn is that advertisement on a web site will mostly be characterised as an invitation to treat and not as an offer. But declarations contained in advertisements on the Internet may, in certain circumstances, amount to offers. For this reason web site owners would be well advised to act carefully to ensure that their statement will not be interpreted as an offer but an invitation to do business only. To achieve the highest degree of certainty they should state on their web site that they do not want to be bound by any communication from a third party, but that they will inform that party should they wish to accept an offer made by him. This would prevent any reasonable inference that an offer is being made on the web site, and furthermore provide clear evidence to a court that the owner did not intend to make an offer.

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[364] *Carlill v Carbolic Smoke Ball Co.* (1893) 1 Q.B. 256.

3 1 1 1 1 2 Electronic mail

An e-mail message differs in one important point from a statement made on a web site. A web site resides on a special server computer and access to it is requested by an e-mail sent through the Internet to a special receiver by a user. This means that while a web site can be visited by anybody, an e-mail message is sent to a specific person. This highlights another difference between web sites and e-mail messages. Considering that the sending of an e-mail message requires the knowledge of the exact e-mail address of the receiver, the parties need to come into contact with each other prior to the transmission of that e-mail message or the sender needs at least to become aware of the receiver`s e-mail address. This "pre-contractual contact" and the fact that a lot of people can visit the same web site, whereas an e-mail message is addressed to a specific receiver, may more readily lead to the inference that an intention to make an offer is present in the case of an e-mail communication as opposed to a statement on a web site. These factors, however, remain only guidelines regarding the intention of the relevant party. The distinction between an offer and an invitation to treat in the case of an e-mail message does not depend in the main on the means of communication, but on the content and the wording of the specific message. The facts and circumstances of the specific case need furthermore be taken into account. This corresponds to the leading cases of *Harvey v Facey*[365] and *Gibson v Manchester City Council*[366] where the content of the statement rather than the means of communication (telegram and letter) was the decisive factor. In these cases the judges did not mention the means of communication at all. The decisions are wholly based on the interpretation of the declarations. Because the function of an e-mail message corresponds to that of a normal letter or a telegram, it does not matter that an e-mail message is sent by an electronic means of communication. This means that an e-mail message should be dealt with not as analogous to web sites and the display of

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[365] *Harvey v Facey* [1893] A.C. 552. For SA law: *Efroiken v Simon* 1921 C.P.D. 367 and *Bird v Summerville* 1960 4 SA 395 (N) 401D; *Hottentots Holland Motors (Pty.) Ltd. v R* 1956 1 PH. K 22 (C) and *Rood v Venter* 1903 T.S. 221.

[366] *Gibson v Manchester City Council* [1979] 1 All E.R. 972.

goods in shop windows, but rather as subject to rules laid down in leading cases such as *Harvey v Facey* and *Gibson v Manchester City Council*.

The situation differs slightly in the case of bulk e-mail, which entails innumerable messages sent through the Internet in the hope of finding a respondent.[367] The nature of a bulk e-mail corresponds more to an advertising brochure than to a single e-mail. The sender of a bulk-mail does not know how many people will receive and take notice of the message. In *Grainger & Son v Gough*[368] and *Seacarries A/S v Aotraroa International Ltd.*[369] it was held that catalogues, brochures and price lists do not amount to offers. The reasoning is the same as in the case of displayed goods in a shop, namely that a person who publishes a brochure might, like a shopkeeper, be exposed to multiple actions for damages if more customers purported to accept than his stock could satisfy.[370] A similar situation occurs in the case of bulk-mails where the sender cannot foresee the number of recipients, and the situations ought to be dealt with on the same basis.

There is a further reason why bulk e-mails should be treated differently from single e-mail. A bulk-mail does not require any pre-contractual contact between two parties or any knowledge of a specific e-mail address and, a bulk mail is furthermore not addressed to a specific person. The only similarity between a normal and a bulk-mail is that both messages are sent through the net. In contrast to an ordinary e-mail message, bulk-mail corresponds more closely to the concept of a web site. Both means of communication are designed to reach an indefinite number of people. A specific recipient has not been identified and therefore no pre-contractual contact is necessary. Although a bulk-mail is more comparable to a web site, an anomaly appears when the conclusion reached in respect of web sites is applied to bulk-mails. If a bulk-mail is regarded as an invitation to treat, the sender could dispatch innumerable messages every day without being bound to any contract. He could overload servers and e-mail

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[367] Hawley „Taking spam out of your cyberspace diet: Common law applied to bulk unsolicited advertising via electronic mail" *UMKC* Vol. 66 (1997) 390.

[368] *Grainger & Son v Gough* (1896) A.C. 325. For SA law: *Hottentots Holland Motors (Pty.) Ltd. v R* 1956 1 PH. K 22 (C) and *Rood v Venter* 1903 T.S. 221; *Crawley v Rex* 1909 T.S. 1105.

[369] *Seacarries A/S v Aotraroa International Ltd.* [1985] 2 Lloyd`s Rep. 419.

[370] See also: *Esso Petroleum v Commissioners of Customs & Excise* [1976] 1 W.L.R. 1.

accounts without any risk of a binding contract. It is technically possible to send a bulk-mail through the net until every user has received the message. Because they do not request the message and in fact receive it without doing so, the receiver of bulk-mails could find these messages an intense annoyance, especially in case of additional or follow-up messages. Although Internet users cannot in general ascertain whether an incoming e-mail is a bulk-mail, there is no risk of being bound to the sender of a bulk-mail if these kind of messages are characterised merely as invitations to treat.

In the final analysis, bulk-mails should generally be treated as web sites because of the similarity in nature referred to above. This means that although bulk e-mails should in most cases be classified as invitations to treat, it should be decided with reference to the surrounding circumstances and the wording of the statement whether an offer or an invitation to do business was constituted in a particular case. The problem of unwanted bulk e-mails is not an issue of contract formation, but one to be resolved by regulative means.

3 1 1 1 2 offer *ad incertas personas*

An offer *ad incertas personas* is an offer to everybody who hears about the offer. Under the English common law, nearly every statement placed on a web site has to be characterised as an invitation to treat and not as an offer. In South African law, such a statement without any additional qualification is addressed to everybody who visits the web site and reads it. It can therefore be characterised as an offer *ad incertas personas*. An e-mail should be treated similarly in English and South African law. An e-mail is addressed to the specific e-mail address of the receiver. It is possible to send the same offer in e-mails to countless receivers, but every e-mail is sent by itself to a specific receiver, and for that reason each e-mail is an offer of its own and does not constitute an offer *ad incertas personas*.

3 1 1 1 3 Termination of an offer

An offer can be revoked at any time before it is accepted,[371] it can be rejected and it can also lapse after a specified event.[372] The reasons mentioned above[373] for the termination of an offer should apply to an offer by electronic means as well, because in the case of revocation, rejection, lapse of time or death the conventional legal consequence should apply for considerations of certainty. The revocation of an offer requires communication to the other party.[374] In the context of a web site where the offeree is required to respond directly, merely amending the site to end the offer and the removal of any electronic order forms, is likely to suffice. In the case of an offer by e-mail, revocation will be effective when another e-mail, although communicated in some other way, is sent and received prior to acceptance. But it would be prudent, where there is a risk of the offeror being bound by an unwanted contract, to specify in the initial offer how it can be revoked.[375]

3 1 1 2 Acceptance

Acceptance is an unqualified declaration of will from the offeree that the terms of contract as set out in the offer are accepted without any reservations.[376] The acceptance needs to be certain, definite and in unambiguous terms.[377] Unless the offeror has prescribed an exclusive mode of acceptance, the offeree is normally free to use whatever means is considered appropriate for acceptance.[378] The offeree is obliged to adhere to a mandatory means of acceptance prescribed by the offeror, even if there are quicker means available.[379] If no method of acceptance is determined in an offer, the mode of

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[371] *Payne v Cave* (1789) 3 Term rep. 148; *Routledge v Grant* (1828) 4 Bing. 653; *Offord v Davies* (1862) 12 C.B. 748. For the reasoning see part 2 para 2 1 1 3 supra.
[372] See part 2 para 2 1 1 3 supra.
[373] Ibid.
[374] *Byrne & Co. v Leon van Tienhoven* (1880) 5 C.P.D. 344; *Dickinson v Dodds* (1876) 2 CH.D. 463.
[375] Smith *Internet Law* 215.
[376] *Holland v Eyre* (1825) 2 Sim. & St. 194; *Harrison v Battye* [1975] W.L.R. 58. For SA law: *Christian v Ries* 1898 13 E.D.C. 8 15; *Joubert v Enslin* 1910 A.D. 6 29.
[377] Ibid.
[378] See part 2 para 2 1 1 2 2 1 supra.
[379] *Financing Ltd. v Stimson* [1962] 1 W.L.R. 1184; *Wettern Electric Ltd. v Welsh Development Agency* [1983] Q.B. 796.

the offer might indicate the expected mode of acceptance.[380] But as mentioned above, it is absurd to push the rule so far that an acceptance can be made only in the same way even if there is an equal or better method.[381] The mode of the response to an offer on a web site could therefore be pre-determined by the web site owner as part of the structuring of the web site itself. However, in context of the Internet, where the parties only know of each other from the net, it is most likely that some positive action such as sending of an e-mail will be the means of communication. Acceptance by electronic means becomes relevant where web sites state that this way of communication can or should be used, or where it is otherwise reasonable to use electronic communication. Furthermore, an e-mail should be a reasonable mode of acceptance where a web site provides a standard form to fill in, but does not state that it is mandatory. In the case of an acceptance by e-mail, a further safeguard can be set by the offer or if he stipulates that an acceptance has to be sent via registered mail. Some systems allow the sender to require the recipient client`s program to send the sender a receipt upon the user accessing and reading his mail. This procedure is supposed to ensure that the offeror receives the acceptance. Unfortunately this receipt is sent as an e-mail as well and because it does not exclude the ordinary risks attached to e-mails, it does not provide any greater reliability.[382] The different modes of acceptance have an important influence on the time and the place of contract and because of their complexity, they are analysed in a separate chapter.

3 1 1 3 Special forms of agreement on the Internet

An agreement consists of an offer and an acceptance directed at the offer.[383] These declarations of intention need to be communicated.[384] This applies also

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[380] See part 2 para 2 1 1 2 2 1 supra.
[381] Ibid for English and South African law.
[382] Davies *Contract Formation on the Internet* 102.
[383] *Steven v Bromley & Son* [1919] 2 K.B. 722; *St. John Tugboat Co. Ltd. v Irving Refinery Co. Ltd.* (1964) s.C.R. 614 at 621. For SA law: *Rose-Innes Diamond Mining Co. Ltd. v Central Diamond Mining Co. Ltd.* 1883 2 H.C.G. 272 at 308; *Potgieter v New York Mutual Life Insurance Society* 1900 17 S.C. 67 at 70; *Greenberg v Waschke* 1911 W.L.D. 1 at 7; *Salisbury Municipal Employees Association v Salisbury City Council* 1957 2 S.A. 554 (SR) 557.
[384] *Taylor v Laird* (1856) 25 L.J. Ex. 329; *Forman & Co. Pty. Ltd. v Ship Liddersdale* [1900] A.C.190.
For SA law: *Bloom v The American Swiss Watch Co.* 1915 A.D. 100 102; *George Ruggier & Co. v Brook* 1966 1 SA 17 (N) 22G 24H.

to an agreement on the Internet. As a result of the developed technology of the Internet, new forms of communication exist and have to be analysed in order to establish their efficacy as a means of contracting. Note must also be taken of special procedures that have been established on the net for purposes of contract formation. One of these procedures is that of electronic data interchange (EDI). More recent developments include agreements with an electronic agent, click-wrap agreements, web-wrap agreements and the shrink-wrap agreement.

EDI was developed by trade partners who wished to trade in a secure environment using specialised closed computer networks. Electronic documents were developed that involve the computerised exchange of standardised and approved messages between computer applications by remote data processing without human intervention.[385] The system presupposes that both parties use a standard format and that they have pre-arranged what this format will be. This means that a computer communicates with another computer without any exterior influence to form a contract between two parties. An example of such a transaction is where a computer system, which manages stock automatically, orders stock from a seller, and the seller`s computer automatically accepts the order. EDI agreements entail a highly structured form of messaging and pre-determined fields. EDI furthermore requires an on-going relationship and the parties usually have an interchange agreement in place which sets out the basis for the exchange. Hence EDI contracts are undoubtedly valid contracts and are binding on both parties.

The electronic agent is a more recent development on the Internet than the EDI, and involves a computer program designed to respond to electronic messages without any exterior influence by generating automated responses to electronic messages received by it. Companies often use electronic agents to sell their products. For this reason Internet users very often "communicate" with an electronic agent situated on a web server of that company. This electronic agent is basically a computer program that is designed to accept offers on behalf of its owner. Where a computer program is used for purposes of

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[385] Hance & Balz *Business and Law on the Internet* (1997) 164; Smith *Internet Law* 207.

acceptance, the web site owner is unable to check the incoming communications. Hence he must ensure that the terms of any submitted offer are as expected and also that the purchaser cannot make a counter offer which might be accepted unwittingly by the electronic agent. If these requirements are fulfilled, an agreement between a purchaser and the electronic agent is valid and enforceable.[386]

Click-wrap and web-wrap agreements have appeared with electronic commerce. In the case of a click-wrap agreement, a purchaser who wants to order a product has to click on a specific icon on the web site that displays the terms and conditions of the contract. Click-wrap agreements do not therefore constitute the conclusion of a contract, but determine the terms and conditions of contract. The mouse click on the icon indicates the acceptance of the terms and conditions. The enforceability of the click-wrap agreement has not yet been tested in court, but most commentators assume that a click-wrap agreement should be enforceable, because the customer is aware of the terms and conditions of contract before a commitment is made.[387] The same principle is used for web-wrap agreements. In this case the terms and conditions are displayed on a screen preceding the actual web site. These terms are generally divided into two sections. The top section expresses the intellectual property rights that the web site owner licenses to viewers; the bottom section attempts to exclude liability for any damage caused by the site.[388] To enter the web site the user has to click a link labelled "I agree", which acknowledges the acceptance of the terms by the user. Users are aware of these terms before the contract is concluded, so that web-wrap agreements should be enforceable as well.

The last special agreement that could be reached on the Internet is the so called shrink-wrap agreement. In this case the terms and conditions of a contract are not displayed on a screen to be accepted by a mouse click, but the

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[386] Smedinghoff *Online Law* 80; Smith *Internet Law* 207. For SA law: Bagraim "Transacting in Cyberspace" *JBL Vol. 6* (1998) 50.

[387] Gringras *Laws of the Internet* 28; Smedinghoff *Online Law* 87. For SA law: Pistorius "Formation of Internet Contracts: An Analysis of the Contractual and Security Issues" *SAMLJ* Vol. 11 (1999) 292.

[388] Gringras *Laws of the Internet* 28.

license terms are shrink-wrapped, that is, contained within the packaging of software and only accepted by the unwrapping of the software.[389] For this reason shrink-wrapped agreements are also called "tear-me-open" license agreements.[390] These agreements are used to prove that the customer is bound to the contract and to dispense with the need to obtain every customer`s signature. This practice is the most common one for the installation of software, where the contract of purchase is concluded before the buyer is able to read the terms contained in the shrink-wrap agreement. Pistorius,[391] a South African commentator, states that in view of the separation of the sale transaction and the shrink-wrap agreement, it does not matter whether or not the purchaser becomes aware of the shrink-wrap agreement before or after the conclusion of the contract of sale. But where the user does not agree to the terms of the shrink-wrap agreement, the agreement is subject to cancellation.[392] No English authority could be found on this issue. But Beale & Dugdale[393] hold that in the case of an offer on standard conditions of business that differ from those incorporated in the acceptance, the terms of contract consist of the terms of the offer subject to the modifications contained in the acceptance.[394] This means that the receiver of the last declaration including standard terms of trade, has to accept these terms if he does not object to them even if he was unaware of the new terms. To preserve the requirement of objective agreement, this legal principle does require that the new terms do not materially alter the terms of the offer.[395] If the change of terms without the knowledge of the offeror is valid, a shrink-wrap agreement that determines the terms of contract after its conclusion should be effective as well. In both of the cases one party is unaware of the terms, and the new terms do not alter the original ones materially. Regarding shrink-wrap agreements it furthermore has to be taken into account that this solution reflects business practices, because this agreement is used, as previously mentioned, to prove that the customer is bound to the contract and it affords the only possibility of dispensing with the need to obtain every

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[389] Smedinghoff *Online Law* 87.
[390] Smith "Tear-open-Licenses - Are They Enforcable in England ?" *2 CLP* (1986) 128 at 129.
[391] Pistorius "Formation of Internet Contracts" *SAMLJ* Vol. 11 (1999) p. 292.
[392] Pistorius Ibid.
[393] *Beale & Dugdale* [1975] 2 B.J.L.S. 45 at 49-51.
[394] Also *Butler Machine Tool Co. Ltd. v Ex-Cell-O-Corp. (England) Ltd.* [1979] 1 W.L.R. 401.
[395] *Butler Machine Tool Co. Ltd. v Ex-Cell-O-Corp. (England) Ltd.* [1979] Ibid; *Beale & Dugdale* [1975] 2 B.J.L.S. 45 at 49-51.

customer`s signature. For this reason, it should not matter in English common law whether the purchaser becomes aware of the shrink-wrap agreement before or after the conclusion of the contract of sale.

This leads us to the recent development concerning shrink-wrap agreements in the United States. Some courts in the United States have held in this case that the shrink-wrap agreement is an unenforceable attempt by the vendor to modify the contract.[396] The law on shrink-wrap licenses has, however, changed. Rather than focusing on the timing of the contract, the UETA (*United States Uniform Electronic Transactions Act*) focuses on whether the user agreed to the terms after having had an opportunity to review them.[397] This corresponds to the view of Pistorius and the proposal for English common law. Hence, the shrink-wrap agreement is also enforceable in terms of the law of contract.

3 1 2 Time and place of contract

The moment at which a contract comes into force and the place where it is concluded may be crucial to crystallise its terms, to determine whether it is still open to withdraw from negotiations and when rights and duties accrue, to establish the priority of two parties wishing to accept an offer where there is insufficient stock to satisfy them both and to determine the legal system which will govern the contract. This latter aspect is especially significant if the parties did not agree to a specific jurisdiction or where there is no applicable international convention to determine the issue. As a result of the borderless nature of the Internet, these contracts are often international transactions. As regards the moment and place of contracting, a choice will have to be made between several possible solutions. The contract could be regarded as concluded when and where the acceptance is sent, where it reaches the offeror`s sphere (which raises the question where the sphere of the offeror starts in the realm of cyberspace), where it reaches its last destination or where it reaches the mind of the offeror.

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[396] *Step-saver Data Systems v Wyse Technology* (1991) 939 Fed Suppl 2d 91; *Arizona Retail Sys. Inc. V Software Link Inc.* (1993) 831 Federal Supplement 759; *ProCD Inc. v Zeidenberg* [1996] W.L. 10068.

[397] See Draft U.C.C. §§ 2B-307 and 2B-308.

The question as to the time and place of contract and the related problem of the technical structure of Internet communication will now be analysed with reference to English common law (including the EU-Directive) and South African law (including the ETC). The technical structure will be examined first in order to create a foundation for evaluating the application of the initiatives and the traditional approach regarding the time and place of contract by conventional means to the Internet. Thereafter differences in the approach of the English common law and in South African law will be considered.

3 1 2 1 Technical structure of Internet communication

The Internet is basically a connection of different networks, which for their part consists of a vast number of connected computers. Hence digital data messages pass through any number of computers on their way to their final destinations. These digital messages can furthermore be stored on a third computer (mostly that of a service provider such as an e-mail server), which is only accessible to the final receiver. These circumstances, and whether communication is instantaneous or not, bear on the choice regarding the time and place of contract formation.

As regards the means of communications on the Internet, a distinction can be made between methods which permit two-way communication, such as chatting, video conferencing or the Internet telephone, and those such as e-mailing or a mouse-click on a web site which involve one-way communication.[398]. In the first instance, a party is able to respond directly to the statement of the other, while in one-way communication, the declaration is dispatched from the side of the originator, transferred through the Internet to a receiving device where it is normally stored for the receiver. There are five basic technical scenarios for communicating an acceptance in such a case. These are communication between two computers, communication via a common server, communication via intermediate servers only, communication

[398] For definitions see part 4 para 3 1 2 2 1 and 3 1 2 2 2 1 infra.

via intermediate servers and networks and communication via a virtual marketplace.[399]

In the case of two-way communication, the parties are in a conversational situation and as such the situation is not without precedent, the only novelty being the medium of communication. What is important as regards the issue of the time and place of contracting is not really the technical scenario, but rather whether the conventional rules for conversational situations (e.g. telephonic communication) are applicable here.[400]

One-way communication over the Internet, however, presents a totally new medium and the technical operation of the Internet might very well influence the decision as to the time and place of contract formation. The first scenario entails communication between two computers with the parties using their own servers. Problems particular to Internet communication are more likely to arise two other scenarios. Where communication takes place via a common server (like AOL or CompuServe), the parties use a single service provider, so that electronic mail is created, stored, sent, delivered and processed on that server. The parties here entrust their message to a third party (the service provider). The circumstance peculiar to the Internet is that the sender does not create and send his acceptance from his personal computer, but from the place where the computer of the service provider is situated. A contract between an English and a South African party via a common server in Germany could therefore be treated as a contract concluded in Germany. Such a result would, however, not accord with the intention of the contracting parties and bring much legal uncertainty. This is the more so because most parties are totally unaware of the location of their e-mail service provider. Where e-mail communication is effected via intermediate servers, the contracting parties use different service providers, which may also be located in different places. But the problem is similar to the first scenario and should be handled in the same way. The question therefore is whether the applicable rules of English and in South African law will attach any importance to common servers or whether the

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[399] Davies *Contract Formation on the Internet* 105.
[400] See part 4 para 3 1 2 2 2 2 infra.

sending or receiving or the actual knowledge of the receiver is the decisive factor.

The case of a mouse click on a web site could lead to problems of a similar nature. These web sites of different vendors or businesses are located on servers which are often located in different places. Such a server for different web sites is called a virtual market place. If the web site visitor clicks on an icon, this "message" may be registered in the server itself, which then functions as an electronic agent.[401] The main server may, however, also send this message out to the computer or the mail-box of the web site owner. If the virtual market place were to be used to determine the place of contract, problems similar to those mentioned above could arise.

3 1 2 2 English Common law

3 1 2 2 1 Placing of an order on web sites

The EU-Directive does not prescribe a theory of contract formation. In principle Art. 10 of the EU-Directive stipulates that the supplier of goods or services over the Internet is obliged to inform the other party of the method of contract formation. If client places his order on a web site of the supplier, Art. 11 para 1 of the EU-Directive establishes an obligation for the supplier to send an acknowledgement of receipt. As analysed above, it seems reasonable to assume that the receipt of acknowledgement will, in most cases, conclude the contract, because of the risk that the supplier might otherwise be held liable to fulfil all obligations resulting from a multitude of acceptances. According to Art. 11 para 1, 3, this regulation is restricted to a situation where the offeree accepts an offer via mouse click, or a comparable technical device, on a web site. This method of agreement is characterised by the limited choice of the offeree who has to accept or to refuse the offer by a mouse click on an icon. Furthermore, Art. 11 para 2 EU-Directive states that an order and the acknowledgement of receipt are deemed to be received when the parties to whom they are addressed are able to access them. This means that a contract via mouse click

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[401] See part 4 para 3 1 1 3 supra.

will in most cases be concluded at the time and the place where the client is able to access the acknowledgement of receipt.

This regulation differs from the former rule only inasmuch that offer and acceptance need to be received. This former rule was based on the following reasoning. Digital data on web sites is transmitted with a "checksum", which allows the receiving computer to check that the correct information has been received.[402] In such a case, the parties will know at once whether their attempt to communicate was successful or not, and the web site will furthermore display whether the mouse click was registered. In this instance, there is a communication between the user`s computer and the computer that runs the web site. This situation is similar to a conventional telephone conversation, but it takes place between computers rather than humans. For this reason, it is in essence a digital conversation, which is displayed for the web site user.[403] The exchange of data, which is displayed for the user, enables both parties to be sure that their communication was successful. This fact is not typical for cases where the postal rule was held to be applicable. Furthermore the parties do not entrust their communication to an independent third party because no service provider is involved, and the Internet cannot be seen as such a third person, as mentioned in the previous chapter. Therefore, the postal rule should not apply to communications via mouse click. This means that the conventional rule applies, and the information must be communicated to the contracting party. This should be accomplished when the digital data or message is received and displayed by the user`s computer. This reasoning reveals that the former rule of contract formation on web sites was based on the distinction between the existing rules. Because of the EU-Directive the traditional rules for time when and place where of contracting pursuant to English Common law can no longer apply any more to this special case.

3 1 2 2 2 Non-codified forms of contract formation

The mouse click on web sites is a common means of contract formation, but there a further forms of communication via electronic means, such as chatting, Internet telephony and e-mail. The formation of contract by these means of

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[402] Gringras *Laws of the Internet* 26.
[403] Gringras Ibid at 27.

communication is not codified in the EU-Directive, and the basic rules of English Common law should therefore be applicable. Because acceptance is regarded as completing the agreement and so constituting a contract, the method whereby acceptance is communicated is regarded as determining both time and place of contracting.[404] In general the contract is concluded when the offeror learns about the acceptance of the offeree, so that the time and place of contract is determined by the awareness of the offeror.[405] Exceptions to this rule have been developed in some cases for an acceptance by silence and where the offeror waives the need to communicate acceptance.[406] But the most important exception in English common law to the requirement of the awareness of the offeror of the acceptance is the so-called "postal rule", where an acceptance takes effect, and a contract is concluded at the time of posting a letter.[407] It needs to be established which rule is applicable to communication via the Internet in the case of two-way and one-way communication. As mentioned in the previous chapter,[408] the decisive factor is whether communication is instantaneous or not.

3 1 2 2 2 1 Two-way communication

The normal conversation between two parties is instantaneous so that the contract is concluded at the place and at the time where the offeror hears the acceptance.[409] The first question should therefore be whether communication by means of chatting, video conferencing or an Internet telephone are comparable to normal conversation so that the general requirement of the awareness of the offeree of an acceptance should also apply. On the Internet, chatting is the exchange of typed-in messages requiring one site as the repository for the messages (or "chat site") and a group of users who take part from anywhere on the Internet. In some cases, a private chat can be arranged

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[404] See part 2 para 2 1 1 2 and 2 1 1 2 2 supra.
[405] See part 2 para 2 1 1 2 2 2 supra.
[406] See part 2 para 2 1 1 2 2 3 and 2 1 1 2 2 4 supra.
[407] See part 2 para 2 1 1 2 2 5 supra.
[408] See part 2 para 2 1 1 2 2 5 supra.
[409] *M`Iver v Richardson* (1813) 1 M. & S. 557; *Mozley v Tinkler* (1835) C.M. & R. 692; *Holwell Securities Ltd. v Hughes* [1974] 1 W.L.R. 155 at 157.

between two parties who meet initially in a group chat. Chats can be ongoing or scheduled for a particular time and duration.[410]

A video conference is a live connection between people in separate locations for the purpose of communication, usually involving audio signals and text passages besides video sequences. At its simplest, video conferencing provides transmission of static images and text between two locations. At its most sophisticated, it provides transmission of full-motion video images and high-quality audio signals between multiple locations. A video conference can be thought of as a phone call with pictures.[411]

Internet telephony is the technology associated with the electronic transmission of voice, fax, or other information between distant parties using systems historically associated with the telephone, a handheld device containing both a speaker or transmitter and a receiver. Internet telephony is the use of the Internet rather than the traditional telephone company infrastructure and rate structure to exchange spoken or other telephonic information.[412]

These means of communication have some similarity to telephone or telex. It was held in *Entores Ltd. v Miles Far East Corp.*[413] that the awareness of the receiver is required because the declaring party will often know at once that his attempt to communicate was unsuccessful, so that it is up to him to make a proper communication.[414] The reasoning in this case contains three examples concerning two-way communications. The first example is that a person shouts an acceptance to another party but that this declaration is drowned down by an aircraft. There should be no contract at that moment. A similar situation occurs in the second example where an acceptance is given by telephone but the line goes dead in the middle of the reply. The third example is the case of acceptance by telex where the line goes dead and no contract is reached. Exactly as in these examples, the parties communicating by the means of

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[410] www.whatis.techtarget.com.
[411] www.whatis.techtarget.com.
[412] www.whatis.techtarget.com.
[413] *Entores v Miles Far East Corp.* [1955] 2 Q.B. 327 at 333.
[414] Also in *Brinkibon Ltd. v Stahag Stahl und Stahlwarenhandel mbH* [1983] 2 A.C. 34; *Gill & Duffus Landauer Ltd. v London Export Corp. GmbH*[1982] 2 Lloyd`s Rep. 627.

chatting, video conferencing or Internet telephony are able to ask if the other party has understood the message, so that the parties can usually determine more or less immediately whether the other party has received and comprehended the message. This may be indicated by the reception of a partial message, or not receiving a response where an immediate response would be expected.[415] These communication services are furthermore "fully duplex", which means that one party receives literally what the other party has said or written and both parties can speak without cutting the other off,[416] with no time delay, as in a normal telephone call. This means that if a term is unclear or something has not been understood, the parties may ask for it to be repeated immediately, so that the risk of not reaching consensus is very small. For these reasons the nature of this mode of communication over the Internet should be characterised as instantaneous and hence subject to the general legal principle that the time and place of contract is determined by the awareness of the offeror.

This corresponds to the prevailing view of English common law commentators. Treitel and Beatson state that the reason for a distinction between instantaneous and non-instantaneous means of communication is that in the latter case a person whose acceptance goes astray, may not know of the loss or delay until it is too late to make another communication.[417] The parties engaged in two-way communication are able to ask whether the other party has received the message, so that chatting, video conferencing and Internet telephony should be classified as instantaneous means of communication. Treitel and Beatson's characterisation of e-mail as an instantaneous mean of communication[418] cannot, however, be relied on in this case, because, as mentioned above, e-mailing entails one-way communication, which might require a different rule.

3 1 2 2 2 2 One-way communication

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[415] Davies *Contract Formation on the Internet* 111.
[416] Smith *Internet Law* 215.
[417] Treitel *Contract* 25; Beatson *Anson`s Law* 44.
[418] Treitel Ibid 26; Beatson Ibid 43.

E-mail messages, which are at present the most common means of communication over the Internet, are examples of one-way communication. The question arises whether the resort to these forms of communication for the purposes of contract formation is subject to the general principle that the offeror must be aware of the acceptance, or whether the so-called postal rule is applicable. The determination of the time and place of the contract again, depends on whether the communication between the parties was instantaneous or non-instantaneous.[419] The very term e-mail could suggest that electronic mail is a form of mail and that the postal rule may be applicable. To prove such a proposition would require a closer look at the reasons underlying the postal rule. Only if these are found to be applicable to acceptance over the Internet by an e-mail message, could the postal rule be supported in respect of e-mail messages.

In a number of judgments, a variety of reasons were advanced for the postal rule. The first one is given in *Henthorn v. Frasier*[420] where it is stated that the offeror must be considered as making the offer continually while his offer is in the post, and that the agreement is complete as soon as the acceptance is posted. The speed of an e-mail message can range from virtually instantaneous to very slow and absolutely non-instantaneous. But the characterisation of an e-mail as an instantaneous or non-instantaneous means of communication cannot depend on the speed of each single e-mail message. In general e-mail messages are very fast and therefore the time the e-mail message is sent through the Internet relatively short. Regarding the argument given in *Henthorn v. Frasier*, one could say that the sender of an e-mail message may be regarded as making the offer all the time that his offer is in transit on the Internet, even if this is only for a very short time. But this argument does not explain why the dispatch of an e-mail message has any significance at all and the application of the postal rule to e-mail messages could be criticised in a similar way as its application in respect of a postal acceptance. In *Household Fire and Carriage Accident Insurance Co. Ltd. v*

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[419] *Entores v Miles Far East Corp.* [1955] 2 Q.B. 327; *Brinkibon Ltd. v Stahag Stahl und Stahlwarenhandel mbH* [1983] 2 A.C. 34; *Gill & Duffus Landauer Ltd. v London Export Corp. GmbH* [1982] 2 Lloyd`s Rep. 627.

[420] *Henthorn v Fraser* [1892] 2 CH. 27.

Grant[421] it was sought to treat the post office as an agent of the offeror not only for the delivery of the offer, but also for receiving the notification of acceptance. The Internet is a technical device and because of its decentralised character it cannot be seen as an agent of either of the parties: it is merely a technique permitting various modes of communication. Only an e-mail provider might conceivably be classified as an agent, but even so, there are differences between the postal service and an e-mail provider. There is one postal organisation in England, which is the Royal Mail, but any number of e-mail service providers active at any given time. These e-mail service providers are not necessarily located in England but might be placed anywhere in the world. E-mail service providers furthermore do not transport the e-mail message personally to the receiver as is the case with the post office, but merely set it on its way on Internet. This means that e-mail service providers have nothing in common with a national post office apart from the fact that both deal with messages of others. This, however, is not enough to equate e-mail service providers with a national postal service. The reason provided for the postal rule in *Household Fire and Carriage Accident Insurance Co. Ltd. v Grant* is in any event criticised by many English commentators, because the post office should not be treated as an agent to receive messages and to conclude a contract on the offeror`s behalf.[422] Even more so e-mail service providers cannot be seen as an agent of the offeror. In the same case it is suggested that the offeror could enquire of the offeree if he is unsure whether a letter of acceptance has been posted.[423] A dispatched acceptance needs usually a short period of time to reach the offeror, which means that in the most cases the offeree will be not unsure if an e-mail message was dispatched. But even where an e-mail message is delayed or missing, this argument is based on the idea that the offeror generally expects to receive a message from the offeree and that the offeror should enquire of the offeree when he does not hear anything from him. This is not necessarily the case, however, because an acceptance can be made by conduct and even by silence.[424] As an example may be taken the case of *Carlill v. Carbolic Smoke Ball Co Ltd*,[425] where the Carbolic Smoke Ball

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[421] *Household Fire and Carriage Accident Insurance Co. v Grant* (1879) L.R. 4 Ex. 216.
[422] See part 2 para 2 1 1 2 2 5 supra.
[423] *Household Fire and Carriage Accident Insurance Co. v Grant* (1879) L.R. 4 Ex. 216.
[424] See part 2 para 2 1 1 2 2 4 supra.
[425] *Carlill v Carbolic Smoke Ball Co.* (1893) 1 Q.B. 256.

Company did not hear anything from Mrs. Carlill. A third reason mentioned in *Household Fire and Carriage Accident Insurance Co. Ltd. Grant* is that the rule is justified because it favours the offeree.[426] This reason obviously applies to communication via e-mail messages as well, even though the time for the transmission of the e-mail may be very short. But this is a one-sided argument and does not take into account that what is economically advantageous to the offeree is economically disadvantageous to the offeror. The postal rule cannot be supported without adequate reasons for favouring the offeree over the offeror. An additional argument is raised in *Adams v. Lindsell*,[427] where it is mentioned that while the offeror is not bound by his offer, the offeree ought not to be bound until he had received the notification that the offeror had received their answer and assented to it and so on. To prevent such a vicious circle it should be better to assume the binding effect at the moment the letter is posted. In the case of an e-mail message the sender receives a message if the e-mail was not sent into the Internet or if the receiver`s e-mail provider could not receive or store the e-mail. This means that the sender at least knows that the e-mail message will be stored in the recipient`s mailbox. For this reason no vicious circle is conceivable and in the reality of trade a confirmation of acceptance is furthermore not expected.

Another reason stated in support of the postal rule is that it is easier to prove that the letter had been posted than to prove that the letter had been received.[428] This reasoning does not apply to the e-mail system, because every incoming e-mail message is automatically stored by the e-mail service provider. Every e-mail service provider stores and displays all incoming and outgoing mails, which can be managed by the e-mail account user. This means that difficulties of proof do not depend on the e-mail system, but on the efficiency of the contracting parties in storing important mails. Because the proof of dispatched and received e-mail messages depends on the efficiency of the parties, no general argument regarding the application of the postal rule to e-mail messages can be derived from this consideration. A last reason for the postal rule given by the courts can again be found in *Household Fire and*

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[426] *Household Fire and Carriage Accident Insurance Co. v Grant* (1879) L.R. 4 Ex. 216.
[427] *Adams v Lindsell* (1818) 1 B. & Ald. 681.
[428] See Winfield "Offer and Acceptence" 55 *LQR* 509.

Carriage Accident Insurance Co. Ltd. Grant,[429] where It was stated that the offeror is allowed to choose any form of communication he wants, or to determine that the posting has no effect.[430] This argument also applies to e-mail communications. The offeror is free to choose a method of acceptance, or may stipulate that any acceptance of his offer should actually reach him. This reasoning does not depend on the means of communication and is therefore the only argument given by courts which is applicable to e-mail messages.

The reasoning for the postal rule in the case of an acceptance by letter neither requires nor sufficiently justifies the application of the postal rule to e-mail messages. There are, however, further arguments mentioned by English commentators that might do so. Treitel states that the postal rule is an arbitrary one, which is the result of weighing up the situation both of offeror and offeree.[431] The offeror may enter into a new contract, believing that the offer is not accepted after the acceptance is posted but before it is received, while the offeree may refrain from entering into other contracts believing in the efficacy of his acceptance. In this situation the English law favours the offeree, because the offeror trusts to the post.[432] Regarding e-mail messages, this reasoning only applies to cases where the message takes much more time than usual to reach the receiver`s mailbox, or gets lost on its way to the receiver. But an e-mail message usually does not take a long time to reach the receiver`s mailbox. Hence, the time between dispatching and receiving an e-mail message, in which the offeror could enter into a new contract or the offeree could refrain from entering into other contracts, is very short. Treitel,[433] Beatson[434] and Gardner[435] furthermore mention that the postal rule is calculated as a corrective to the injustice of the rule that an offer for which no consideration has been given may be revoked by the offeror at any time, even though he promised that it would remain open for a certain period.[436] The idea is that making acceptance complete at posting rather than delivery and conversely making the

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[429] *Household Fire and Carriage Accident Insurance Co. v Grant* (1879) L.R. 4 Ex. 216.
[430] See also *Holwell Securities Ltd. v Hughes* [1974] 1 W.L.R. 155 at 157.
[431] Treitel *Contract* 24.
[432] *Household Fire and Carriage Accident Insurance Co. v Grant* (1879) L.R. 4 Ex. 216.
[433] Treitel *Contract* 25.
[434] Beatson *Anson`s Law* 46.
[435] Gardner „Trashing with Trollope" *OJLS* (1992) 177, 78.
[436] See part 2 para 2 1 1 3 supra.

offeror`s revocation ineffective until communicated, minimizes the window within which such a revocation may take place. But in respect of the technical development of the e-mail system this argument loses much of its power. As already mentioned, the time for the transmission of e-mail messages is usually very short and the acceptance will usually be received shortly after its dispatch. This means that there is very little time in which the offeror could revoke his offer. On the other hand, if the offeror revokes his offer, this revocation will, because of the short transmission time, usually arrive before the offeree dispatches his acceptance. It is therefore almost pointless to use the postal rule as a corrective to the freedom of the offeror to revoke his offer. Without relating their arguments for the application of the postal rule to e-mail messages, Treitel[437] and Beatson[438] agree with each other in their classification of e-mail messages as an instantaneous means of communication. Their reasoning is similar to the argument advanced in respect of two-way communications in *Entores Ltd. v Miles Far East Corp.*,[439] namely that the declaring party will often know at once that his attempt to communicate was unsuccessful, so that it is up to him to make a proper communication. In such a case of an instantaneous communication the postal rule does not apply.[440] Only Treitel excludes from the characterisation of an e-mail message as an instantaneous mean of communication the case where the sender of the message does not know, or has no mean of knowing at once of any failure in communication. [441]

Another alternative argument which might support or exclude the application of the postal rule to e-mail messages is introduced by Gardner. He uses the historical development of the post to explain the development of the postal rule.[442] In 1840, the uniform penny post was introduced and was radically more direct than its predecessors. The mail also began to be carried on the new railways, which speeded up the delivery of the post enormously. Gardner mentions that this circumstance might have been the reason for the idea that

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[437] Treitel *Contract* 25 and *Chitty on Contract* Vol. I 112.
[438] Beatson *Anson`s Law* 43.
[439] *Entores v Miles Far East Corp.* [1955] 2 Q.B. 327 at 333.
[440] *Entores v Miles Far East Corp.* [1955] 2 Q.B. 327; *Brinkibon Ltd. v Stahag Stahl und Stahlwarenhandel mbH* [1983] 2 A.C. 34; *Gill & Duffus Landauer Ltd. v London Export Corp. GmbH* [1982] 2 Lloyd`s Rep. 627.
[441] Treitel *Contract* 26.
[442] Gardner „Trashing with Trollope" *OJLS* (1992) 178 to 192.

although delivery was important, in the newly prevailing conditions posting and delivery were little different, so that once posted, a letter was as good as delivered.[443] This is exactly the presently prevailing opinion about the e-mail system. Although it is well-known that an e-mail message might be delayed or even get lost, it is a common view that an e-mail usually reaches the mailbox of the receiving party within a very short time. This correspondence of the common view in 1840 and of the present might indicate the applicability of the postal rule to e-mail messages. On the other hand, it needs to be said that in regard to the postal system it turned out after some time that the equation of posting with delivery had failed.[444] The introduction of telephones in 1878 furthermore, revealed limitations of the postal service.[445] But in respect of the e-mail system the present view is of e-mail messages is still comparable to that of 1840 about the postal system. In contrast, however, Gardner mentions that the development of additional new modes of remote communication such as telex has further discredited the old tendency to equate posting with delivery. But he also states that the rule remains the law until the decisions establishing it are overruled.[446]

A summary of the arguments presented above shows that most of the reasons given for the postal rule by the courts do not justify its application to e-mail messages. On the other hand, English commentators do not relate their arguments for the postal rule to e-mail messages, but state that an e-mail message is an instantaneous means of communication because the declaring party will often know at once that his attempt to communicate was unsuccessful, so that it is up to him to make a proper communication. The comparison of the historical development of the postal rule to the e-mail system also does not allow a clear decision about the application of the rule to e-mail messages. None of the arguments discussed fully takes into account the technical process of an e-mail communication. A closer look at this technical process might help to characterise an e-mail communication as instantaneous or not.

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[443] Gardner Ibid 180.
[444] Gardner Ibid.
[445] Gardner Ibid at 190.
[446] Gardner Ibid at 191.

Davies' analysis of the structure of network connections provides a basis for a considaration of the technical aspects of communication by way of the Internet.[447] Because of the novelty of one-way communications by this means, it is important to examine at what time dispatch and receipt may be said to have taken place in the different technical scenarios. The first technical scenario is communication between two computers where the parties use their own server. This method is mostly used by large companies running their own server.[448] In this scenario only the two end-user computers, the offeree`s and the offeror`s, are involved. This means that an e-mail is dispatched when it is put out of the possession of the offeree and sent into the Internet. This should be accomplished when the offeree receives the system acknowledgement that the message was sent successfully. For purposes of receipt in this scenario, different moments may be regarded as relevant. An e-mail message could be received when it reaches the mailbox on the end-user computer of the offeror, or when the offeror actually accesses it. Alternatively, the postal rule may apply so that the contract is concluded when the message is dispatched. An argument for the application of the postal rule is that an e-mail once sent into the Internet, is broken up into smaller pieces which independently find their way to their common destination. On their way these data packets pass through other computers. By way of the standardized transmission method, the data packets are led through these computers to their final destination. The data packets are completely independent of each other and are able to take totally different paths to their destination.[449] To enable different computers to pass data packages, e-mails are sent using protocols. But sometimes these protocols are used incorrectly and an e-mail may arrive entirely garbled or missing a few important characters.[450] This circumstance or the present overcrowding of the Internet may also lead to the delay of an e-mail message. These reasons may indicate that e-mail communication between two computers should not be characterised as an instantaneous communication, so that the postal rule could apply in this scenario.

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[447] See part 4 para 3 1 2 1 supra.
[448] Fasciano „Internet Electronic Mail: A last bastion for the mailbox rule" *Hofstra Law Review* Vol. 25 (1997) 994.
[449] See part 4 para 3 supra.
[450] Gringras *Laws of the Internet* 24.

A strong argument against the application of the postal rule can be found if regard is had to the situations where the rule has been held to be applicable. In every case, the parties entrusted their communications to a independent third party.[451] But the Internet is of a decentralised nature and is not controlled by any single entity.[452] This does not change because of the fact that the sender is unable to retract the message once it has reached the Internet. It was held in *Re London & Northern Bank*[453] that handing a letter to a postman authorised to deliver letters is not posting. This implies that the parties in this technical scenario do not entrust their communication to a third party and that even though e-mail communication does not entail a dialogue situation, the postal rule should not apply. The time and place of contract can on this view be determined only with reference to the time the message reaches the mailbox on the end-user computer of the offeror or when the offeror actually accesses it. The latter approach would be the last possible moment for the conclusion of contract, but its adoption would place the offeree at a disadvantage. The offeree has no influence on the time the offeror accesses his e-mail account, and the conclusion of the contract would be wholly dependent on the will of the offeror. The moment at which the message reaches the mailbox on the receiving computer seems to be more reasonable as the decisive moment for the conclusion of the contract in this scenario.

The second technical scenario is communication via a common server (like AOL or CompuServe) where the parties use a single service provider and any electronic mail is created, stored, sent, delivered and processed on that server. In this case two end-user computers and the computer of the common server are involved. Because the e-mail message in this case is created on the intermediary computer of the e-mail server, an e-mail message should be regarded as dispatched when it is sent into the recipient`s mailbox and the e-mail provider confirms that the message was sent successfully. For purposes

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[451] See e.g. *Henthorn v Fraser* [1892] 2 CH. 27at 33; *Adams v Lindsell* (1818) 1 B. & Ald. 681; *Potter v Sander* (1846) 6 Hare 1; *Harris` Case* (1872) L.R. 7 CH. App. 587; *Brinkibon Ltd. v Stahag Stahl und Stahlwarenhandel mbH* [1983] 2 A.C. 34; *Re London & Northern Bank* (1900) 1 Ch. 220; *Household Fire and Carriage Accident Insurance Co. v Grant* (1879) L.R. 4 Ex. 216; *Dunlop v Higgins* (1848) 1 H.L.C. 381; *Byrne & Co. v Leon van Tienhoven* (1880) 5 C.P.D. 344.

[452] Davies *Contract Formation on the Internet* 100.

[453] *Re London & Northern Bank* (1900) 1 Ch. 220.

of defining receipt, the three moments mentioned in respect of the first scenario, have to be considered again. The resort to a common server and communication within a system over which the server operator has control implies that the parties entrust their communication to a third party. This means that the postal rule is in principle applicable. Users sending a message into the server would be fairly sure of the message arriving at the offeror`s mailbox. Therefore, the argument of the technical problems which might occur during the transmission mentioned in the first scenario, is not completely transferable to this case. What must be taken into account, however, is that the intermediate computer might be not in working order and that no other direct communication line might exist between the contracting parties. On the other hand, the argument against the postal rule based on the absence of an independent third party to whom communication is entrusted, does not apply here. For this reason the postal rule should from a technical point of view apply in this scenario.

The final scenario is where an e-mail communication is effected via intermediate servers and the contracting parties use different service providers. In this case two end-user and two service provider computers are involved. Because of the similar situation on the "sender`s" side, the moment of dispatch should correspond to the second scenario. A similar situation occurs concerning the receipt and the application of the postal rule. The parties entrust their communication to a third party and no other direct line of communication exists between the contracting parties. Furthermore, the argument regarding the possibility of technical problems during transmission that was mentioned in respect of the first scenario, does apply here. The sender`s service provider needs to send the message into the Internet on its way to the receiver`s service provider, so that the situation is technically similar, with the difference that two intermediary computers of the service providers are involved. This means that apart from technical problems relating to the Internet, problems might also occur at these intermediary computers. These reasons point to a characterisation of an e-mail communication in this scenario as non-instantaneous, so that the postal rule should apply.

This result is supported by comparison with a conventional telephone call as a typical mode of an instantaneous mean of communication. The differences between an e-mail and a telephone line is that there is no direct line of communication between sender and receiver. An e-mail is broken into chunks and sent as a collection of packages with the help of the TCP/IP protocol. Each package contains the address of the receiver and is because of that capable of direction to its final destination along different pathways. Precisely because of this fragmentation and the possibility of a package being misaddressed, the transmission is liable to be delayed or missaddressed. There is another reason why an e-mail cannot be compared to a telephonic message. During a telephone call it is very easy to verify that the receiver has understood the message. Because of the TCP/IP protocol and its special language, only computers can pass data accurately to each other. Sometimes these protocols are used incorrectly and some data and an e-mail arrive with some signs missing. For this reason is almost impossible to check that the offeror has received an unequivocal message. An e-mail should therefore, at least in the latter two scenarios, be treated as involving non-instantaneous communication so that the postal rule should apply. In the case of e-mail communication between two computers without any resort to a service provider, the rule should not apply because of the reasons mentioned above.

3 1 2 3 South African law

In general South African law holds a contract to be concluded when and at the place where the offeror learns of the acceptance.[454] This is the so-called "information theory" relating to the formation of contract. But some departures from this principle are recognised in South African law. An important exception is made in the case of postal acceptances. As is the case under English law, it was held in *Cape Explosives Works Ltd. v SA Oil and Fat Industries Ltd.*[455] that such contracts arise at the time of the posting of the acceptance. Later

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[454] *Dietrichsen v Dietrichsen* 1911 T.P.D. 486; *Fern Gold Mining Company v Tobias* 1890 3 S.A.R. 134; *Bloom v The American Swiss Watch Co.* 1915 A.D. 100 102; *Smeiman v Volkersz* 1954 4 SA 170 C) 176; *Driftwood Properties (Pty.) Ltd. v McLean* 1971 3 SA 591D; *Millman v Klein* 1986 1 SA 465 (C); *Amcoal Collieries Ltd. v Truter* 1990 1 SA (A) 4.

[455] *Cape Explosives Works Ltd. v South African Oil and Fat Industrie Ltd.* 1921 C.P.D. 244.

decisions have confirmed this decision and have made clear that the so-called "expedition theory" is restricted to postal contracts and is not of general application to contracts which are concluded *inter absentes*.[456]

The application of the information theory is also subject to the possibility that the offeror may prescribe a method of acceptance.[457] From this proposition follows another exception. In selecting a method of acceptance, the offeror can not only do away with the need for acceptance to come to his attention, but also determine that the postal rule does not apply to a postal acceptance. In *A to Z Bazaars (Pty) Ltd. v Minister of Agriculture*[458] it was held that the postal rule does not apply if a contrary intention of the offeror could be inferred or a different rule is imposed by a statute. Here a statute indicated that the moment of receipt, ie the time of actual delivery of a written acceptance was decisive. In respect of long-standing business connections, contracts are often on this approach redarded as coming into being where the offeree gives expression to his acceptance. The abovementioned exceptions to the general rule of the information theory depend both on the means of communication and the intention of the offeror. There is accordingly no single theory adequate to cover practical demands for a differentiated treatment of dissimilar cases.[459]

The distinctions implied by the case law is only neccessary where the parties make their declarations of intention at two different places and at different times.[460] Where the parties reach agreement at the same moment and at the same place in a direct conversation or in a conversational situation, eg by means of a telephone, a contract is concluded *inter praesentes*. In such a case the contract comes into being where and when the parties agree and no problems regarding the formation of contract arises. Problems regarding the time and the place of contract arise only in the absence of a conversational situation, in the case of a contract *inter absentes*. In respect of South Africa, it

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[456] *Kergeulen Sealing and Whaling Co. Ltd. v Commissioner of Inland Revenue* 1939 A.D. 487 at 503-5.
[457] *Driftwood Properties (Pty.) Ltd. v McLean* 1971 3 SA 591D; *Dietrichsen v Dietrichsen* 1911 T.P.D. 486; *Hawkins v Contract Design Center (Pty.) Ltd.* 1983 4 SA 296 (T) at 308C-312C.
[458] *A to Z Bazaars (Pty) Ltd. v Minister of Agriculture* 1974 (4) S.A. 392 (c); *SA Yster & Staal Industriele Korporasie Bpk v Koschade* 1983 4 SA 837 (T).
[459] Paton/ Derham *A Textbook of Jurisprudence*, 4.ed (1972) p.447.
[460] Joubert *General Principles* 45.

has now to be analysed how the different modes of communication on the Internet are to be dealt with in respect of the determination of the time and place of contracting on the Internet. With regard to the basic rules of contract formation in South Africa, the ETC also needs to be considered. The ETC is based on the UNCITRAL Model Law on e-commerce. As in Art. 15 UNCITRAL Model Law the Art. 22, 23 ETC propose a solution to the problem of contract formation and the determination of time and place of contract. The analysis will proceed on the basis of the distinctions as regards the means of communication developed in the discussion of English law.

3 1 2 3 1 Two-way communication

In the case of instantaneous communication between two parties *inter praesentes*, a contract is concluded in accordance with the information theory at the place and at the time where the offeror becomes aware of the acceptance. The question again should be whether modes of communication such as chatting, video conferencing or communication via an Internet telephone[461] are comparable to telephonic communication and therefore whether the general requirement of awareness of an acceptance on part of the offeree should also apply to these means of communication.

It was held in *Wolmer v Rees*[462] that in the case of a telephone communication the expedition theory should apply. The reasoning was that a person who makes an offer over the telephone authorises the use of the instrument for an acceptance, so that there is an acceptance as soon as it is uttered into the telephone.[463] The question next arose in *Tel Peda Investigation Bureau (Pty) Ltd. v Van Zyl*,[464] where the court dissented from *Wolmer v Rees* and followed the English case of *Entores Ltd. v Miles Far East Corp.*[465] decided in 1955. This decision was based on the reasoning that the parties in telephonic conversation are virtually in the same position as if they are *inter praesentes*. In order to speak to each other they make use of an instrument that enables them

[461] For definition see part 4 para 3 1 2 2 1 supra.
[462] *Wolmer v Rees* 1935 T.P.D. 319.
[463] Ibid at 324.
[464] *Tel Peda Investigation Bureau (Pty.) Ltd. v Van Zyl* 1965 4 SA 475 (E).
[465] *Entores v Miles Far East Corp.* [1955] 2 Q.B. 327 at 333.

to do so.[466] This principle was confirmed in later cases.[467] In the case of two-way communication over the Internet a similar situation presents itself. The parties are also in virtually the same position as if they are conducting a conversation *inter praesentes*. If a term is unclear or something has not been understood, either party may ask for it to be repeated immediately, so that the risk of not reaching consensus is very small. In the *Tel Peda case*[468] the judge expressly approved the reasons given in the *Entores case* as clear and convincing.[469] The analysis concerning this reasoning in the discussion of English law in respect of electronic means of communication, [470] should therefore also find application here. This corresponds with the view of South African commentators. Kerr[471] and Christie[472] mention that electronic methods of instantaneous communication are subject generally to the same rules as those entered into by telephone. Hence, two-way communication over the Internet should be characterised as an instantaneous communication *inter praesentes*, so that the information theory should apply in accordance with the basic rules of contract formation. This result of the conventional rule is modified by the proposal of Art. 23 (2) ETC, where it is stated that an agreement is concluded at the time and the place where the acceptance of the offer was received by the offeror. This means that it is not necessary for the offeror to learn about the acceptance, but the complete data message has to enter an information system designated for that purpose by the addressee, and the message has to be capable of being retrieved and processed by the addressee.

3 1 2 3 2 One-way communication

According to the basic rules of contract formation, the determination of time and place of contract in the case of e-mail message and mouse click depends again on whether the communication between the parties is *inter praesentes* or *absentes* and instantaneous or not.

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[466] *Entores v Miles Far East Corp.* [1955] Ibid at 479.
[467] *Odendaal v Norbert* 1973 2 SA 749 (R); *S v Henckert* 1981 3 SA 445 (A) 451B.
[468] *Tel Peda Investigation Bureau (Pty.) Ltd. v Van Zyl* 1965 4 SA 475 (E).
[469] *Tel Peda Investigation Bureau (Pty.) Ltd. v Van Zyl* 1965 4 SA at 479.
[470] See part 4 para 3 1 2 2 1 supra.
[471] Kerr *Law of Contract* 110.
[472] Christie *Law of Contract* 84.

Regarding e-mail messages, it needs to be analysed whether the reasons for the postal rule given by the court in South African law also apply to e-mail messages. In *Cape Explosive Works*[473] the expedition theory was used on account of its supposed practical convenience. This general argument could support the application of the expedition theory to e-mail messages if proof of the dispatch of an e-mail is easier than proof of its receipt. But as already indicated in the previous chapter,[474] the difficulties of proof do not depend on the e-mail system, but rather on the efficiency of the contracting parties as regards the storing of important e-mail messages. Proof of dispatched and received e-mail messages depends on the efficiency of the parties, and there is no basis for a general argument for the application of the postal rule to e-mail messages on this ground. The notion of practical convenience has in any event been criticised as entailing a fiction so that it cannot be regarded as persuasive. Joubert states that insufficient attention was paid to the defects of the theory and the possibility that the letter of acceptance might be lost or delayed.[475] There is also the possibility that the offeree, who cannot tear up his letter of acceptance, may decide to use a speedier method of communication and inform the offeror to ignore the letter of acceptance when it reaches him.[476]

In other cases the application of the expedition theory is explained on the basis that an offeror who uses the post to convey the offer thereby prescribes the post as the mode of acceptance.[477] This reasoning could apply to e-mail communications as well. But this argument cannot justify the application of the postal rule, because all that can be inferred from a resort to e-mail for the making of an offer is that the offeror has not excluded the use of this medium for acceptance. That the offeror may waive the information or expedition rules does not imply that this is what occurs when an offer is sent by post.[478] This criticism also applies to an e-mail communication, so that the application of the

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[473] *Cape Explosives Works Ltd. v South African Oil and Fat Industrie Ltd.* 1921 C.P.D. 244 at 262 at 266.
[474] See part 4 para 3 1 2 2 2 2 supra.
[475] Joubert *General Principles* 48.
[476] Joubert Ibid.
[477] *Bloom v The American Swiss Watch Co.* 1915 A.D. 100 102; *Smeiman v Volkersz* 1954 4 SA 170(C) 176 at 177; *Wolmer v Rees* 1935 T.P.D. 319 at 324; *Cape Explosives Works Ltd. v South African Oil and Fat Industrie Ltd.* 1921 C.P.D. 244 at 262.
[478] Joubert *General Principles* 48.

expedition theory in this context is subject to the same criticism as its application in the case of a postal acceptance.

The reasons for the postal rule given by courts therefore neither require nor justify its application to e-mail messages. But as is the case in respect of English law, there might be some further arguments which might do so in respect of e-mail communication. Once again Davies' distinction between an e-mail communication between two end-user computers, via a common server and via intermediate servers where the contracting parties use different service providers, provides a useful background.[479] In the scenario of an e-mail communication between two computers, the analysis of the technical problems which might occur during the transmission and the conclusions[480] apply here as well.[481] But this ought not to justify the application of the expedition theory. The kind of case where the expedition theory was held to be applicable in English law,[482] seems to be distinguishable from the case of e-mail communication. In all of the cases where the postal rule was applied, the parties entrusted their communication to a third party, whereas as indicated previously, the Internet cannot be regarded as such a third.[483] The general rule regarding the formation of contracts and not the expedition theory should therefore apply to this scenario in South African law, so that the awareness of the offeror of the acceptance would be the decisive factor. It is to be borne in mind, however, that this scenario does not entail a dialogue situation and that the offeree has no influence on when the offeror checks his e-mail account and becomes aware of the message. This constitutes an argument for holding that the time and place of contract should be determined by the moment the e-mail message reaches the mailbox of the offeror. In the first scenario, the basic rule exactly correspond to Art. 23 (2) ETC, where the time and place of contract is determined by the receipt of acceptance. According to Art. 24 (b) ETC, a message is received, when the complete data message enters an information

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[479] See part 4 para 3 1 2 2 2 2 supra.
[480] Ibid.
[481] Van der Merwe/ Van Vuuren *Cyberlaw* 170.
[482] *Bloom v The American Swiss Watch Co.* 1915 A.D. 100 102; *Smeiman v Volkersz* 1954 4 SA 170 (C) 176 at 177; *Wolmer v Rees* 1935 T.P.D. 319 at 324; *Cape Explosives Works Ltd. v South African Oil and Fat Industrie Ltd.* 1921 C.P.D. 244 at 262.
[483] See part 4 para 3 1 2 2 2 2 supra.

system designated or used for that purpose and is capable of being retrieved and processed by the addressee.

The technical reasoning as regards the second and third scenarios also applies to South African law, because the technical process and the applicable legal principles are similar. The parties entrust their communication to an independent third party in these scenarios, so that the expedition theory could apply. In addition to the arguments referred to in the previous section, South African commentators often use the comparison to telephonic communication to portray an e-mail communication as non-instantaneous. The reasoning corresponds to that of English law. The first difference is that there is no direct line of communication between sender and receiver in the case of an e-mail communication.[484] An e-mail is broken into chunks and sent as a set of data packages which each contains the address of the receiver and because of that may find their way to the final destination along different routes.[485] The second difference is that it is very easy to verify during a telephone call that the receiver understood the message, whereas this aspect of a dialogue situation is missing in the case of an e-mail communication.[486] This is supported by the view of Van der Merwe. He concludes that an e-mail can in a factual sense be either be instantaneous or non-instantaneous, but because of these features of e-mail communication and the attendant risk of delay, the communication is strictly speaking not to be equated to communication *inter praesentes*. In the case of e-mail communication in which a service provider is involved therefore, the expedition theory should apply according to the conventional rules of contract formation.[487] The result for the second and third scenarios does not correspond to the proposal stated in Art. 23 (2) ETC. An explanation for this deviation can be found in the novelty of this technical device. The communication via e-mail is a totally new means of communication to which laws must be applied. The time delay caused by e-mails is not comparable to the postal service. Furthermore, the e-mail services have become extremely reliable. Based on the assumption that the e-mail service is reliable and that there is little space between the

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[484] Bagraim „Transacting in Cyberspace" *JBL* Vol. 6 (1998) 51; Pistorius "Formation of Internet Contracts" *SAMLJ* Vol. 11 (1999) 289.
[485] Bagraim; Pistorius Ibid.
[486] Bagraim; Pistorius Ibid.
[487] Van der Merwe/ Van Vuuren *Cyberlaw* 170.

dispatch and the receipt of an e-mail, there is no advantage for the recipient in using the expedition theory. Another reason can be seen in the standardization of regulations concerning the formation of contract. The UETA of the United States is also based the UNCITRAL Model Law. This means that an increasing number of states have a similar legislation concerning e-commerce. This leads to a simplification of contract formation for international contracts. This is an important aspect, especially with regard to the borderless nature of the Internet.

The legal meaning given to a mouse click on web sites is, according to the conventional rules, similar to the former reasoning in English law. As mentioned in the previous section,[488] in such a case, digital data is transmitted with a "checksum", which allows the receiving computer to check that the correct information has been received. Because no service provider is involved, the parties also cannot be said to have entrusted their communication to a independent third party. This is not typical of cases were the expedition theory has been held to be applicable in South African law.[489] The general rule of the information theory should therefore apply to communication via web sites. That would correspond to *Kergeulen Sealing & Whaling Co. Ltd. v Commission for Inland Revenue*[490] where it was held that the expedition theory is restricted to postal contracts and is not of general application to contracts concluded *inter absentes*. This means that the application of the conventional rules lead to the very same result as is proposed in Art 23 (2) ETC. According to both statutes, an agreement is concluded at the time and place the acceptance was received.

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[488] See part 4 para 3 1 2 2 2 2 supra.

[489] *Bloom v The American Swiss Watch Co.* 1915 A.D. 100 102; *Smeiman v Volkersz* 1954 4 SA 170 (C) 176 at 177; *Wolmer v Rees* 1935 T.P.D. 319 at 324; *Cape Explosives Works Ltd. v South African Oil and Fat Industrie Ltd.* 1921 C.P.D 244 at 262.

[490] *Kergeulen Sealing and Whaling Co. Ltd. v Commissioner of Inland Revenue* 1939 A.D. 487 at 503-05.

3 2 Civil law

3 2 1 Declaration of intention by electronic means

Declarations of intention by electronic means fall into two categories: apart from a declaration of will formulated by the party itself and transmitted via electronic means, a declaration may be generated and transmitted by a computer program.[491] A declaration of the former kind is a conventional declaration in the sense of the BGB, albeit it is not transmitted by telephone, but by the use of electronic means. This kind of declaration is effected when it is created on the computer of the sender, transmitted via the Internet and reaches the receiver`s computer.[492]

Problems arise in the case of a declaration generated by a computer program. A declaration of will consists in general of two elements, namely an inner intention and an external declaration thereof.[493] In the case of a declaration generated by a computer program the requirement of the inner intention requires closer examination. This intention consists of the intention to act (*Handlungswille*), the intention of stating something of legal consequence (*Erklärungsbewußtsein*) and the intention underlying a transaction (*Geschäftswille*), which is not an essential requirement for a declaration of will.[494] In the case of electronic data processing, no human declaration is made and a computer cannot of course form any intention. For this reason the declaration generated by a computer does not at first glance seem to meet the requirements. It has to be taken into account, however, that a party who uses a computer to create declarations demonstrates an intention by resorting to it. This can be seen as the intention of stating something of legal consequence and a commitment to accept the computer's declaration as the one`s own,[495] for

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[491] Eisenhardt „Zum subjektiven Tatbestand der Willenserklärung" *JZ* 1986 875; Clemens „Die elektronische Willenserklärung- Chancen und Gefahren" *NJW* 1985 1999.

[492] Taupitz/ Kritter "Electronic Commerce – Probleme bei Rechtsgeschäften im Internet" *JuS* 1999 839.

[493] Kramer- *Münchener Kommentar* vor § 116 note 21; Jauernig- *Jauernig* vor § 104 note 1a.

[494] Jauernig- *Jauernig* vor § 116 note 3; Medicus *AT* § 6 note 3; Hübner *AT* note 376.

[495] Dilcher- *Staudinger* vor § 116; Kramer- *Münchener Kommentar* vor § 116 note 21; Jauernig- *Jauernig* vor § 104 note 1a; Clemens „Elektronische Willenserklärung" *NJW* 1985 1998 at 2001; Heun "Die elektronische Willenserklärung – Rechtliche Einordnung Anfechtung und Zugang" *CR* 1994 596;Eisenhardt „Willenserklärung" *JZ* 1986 875.

otherwise one would not use such a system of communication.[496]

It is, however, a necessary requirement that the party`s intention to establish this legal consequence should be outwardly discernible. Such a general intention is sufficient to impute the declaration to the operator`s sphere of legal responsibility. There is, however, another reason for such an conclusion: In most of the cases the receiver will be unable to establish whether the declaration was created by the sender or by his computer program. This means that the receiver necessarily relies on the statement as a legally binding declaration of the originator.[497] Because of the sender`s intention to accept the declaration as its own and the need to protect the *bona fide* acts of the receiver, a declaration generated by a computer program is regarded as a preprogrammed declaration of the sending party, not created by sender, but by a technical device.[498] Hence both the declaration of will formulated by the party and transmitted via electronic means and a declaration generated and sent by a computer program are intentions of will in the sense of the German Civil Code. This means that the German Civil Code corresponds to Art. 9 of the EU-Directive, which states that the member states must ensure that their legal systems allow contracts to be concluded by electronic means. This principle is stated in §§ 126 a, 312 b, 312e BGB.

3 2 2 Offer and acceptance by electronic means

The German BGB came into force on the 1st of January 1900. At that time communication via Internet and e-mail was not even a far-off glimmer on the horizon, and therefore unanticipated and unprovided for by law. Meanwhile, the EU-Directive forces the member states to ensure that contracts can be concluded by electronic means. The German Civil Code was recently revised in some aspects. These changes took effect on January 1, 2002. Among other modifications, the "*Fernabsatzgesetz*" (FernAbsG) was integrated into the BGB, and special regulations concerning contract formation by electronic means were

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[496] Jauernig- *Jauernig* vor § 104 note 1a; Kramer- *Münchener Kommentar* vor § 116 note 21; Clemens „Elektronische Willenserklärung" *NJW* 1985 1998 at 2001.

[497] Kramer- *Münchener Kommentar* vor § 116 note 21; Dilcher- *Staudinger* vor § 116; Heun „Die elektronische Willenserklärung" *CR* 1994 596.

[498] Koch *Internet Recht* (1998) 131.

codified. One of these special regulations is § 312e BGB, which codified Art. 10 and 11 EU-Directive in German national Law. As was mentioned in reference to English common Law, this rule refers to a special case, namely the contract formation via mouse click on web sites. Because of its effect on the time and place of contracting, § 312e and Art. 10 and 11 EU-Directive will be described in that regard. Since the dawning of the technological age, therefore, conventional laws have had to be applied in the matter of contract formation by electronical means of communication other than a mouse click on web sites. The general principles concerning a contract are stipulated in the general part of the BGB (§§145 ff.), as a component of the concept of a legal act (*Rechtsgeschäft*). A contract on the Internet is accordingly defined as a comprising a correspondence of the intentions of two or more parties concerning a legal consequence.[499] Declarations of intention are therefore also the most important element for the creation of relationships in respect of Internet contracts. With regard to the moment of contracting, the first declaration is normally seen as the offer, and the second as an acceptance. The requirements for a valid offer correspond to the ordinary requirements in this regard, so that it has to be clear and definite as regards its content.[500] Concerning an acceptance by electronic means, therefore, there are no special problems except the general one relating to the dispatch and receipt of declarations over the Internet. The acceptance must also correspond to the offer. An acceptance which contains different or additional terms, does not conclude an agreement, but amounts to a counter-offer.[501] However, some principles of law concerning the offer do need a closer examination in the case of an offer via electronic means of communication. Of particular importance is whether the developed principles for the distinction between a non offer and an offer *ad incertas personas* or an *invitatio ad offerendum* apply to such modern means of communication.

The offer is a declaration of will that proposes the conclusion of contract to someone on the basis that that party has to approve the offer in order to establish agreement. The offer has to contain at least the essential

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[499] Widmer/ Bähler *Rechtsfragen beim Electronic Commerce* (1999) 141.
[500] See part 3 para 2 1 2 supra.
[501] Widmer/ Bähler *Electronic Commerce* 146.

components of the proposed contract.[502] Besides these *essentialia negotii,* an offer has to identify the other contracting party expressly or by inference. If the other contracting party is not determined, the offer could either be an offer *ad incertas personas,* or no offer at all. As in common law, an offer *ad incertas personas* is an offer to the public that can be accepted by anybody who comes to know of it.[503] German courts have, however, developed some additional requirements for a valid offer *ad incertas personas* and the German commentators support this view.[504] In the case of vending machines for instance, the requirements are that a valid offer has been made if the goods are available, the vending machine is in working condition and the correct coin is inserted into the machine.[505] An offer furthermore requires a willingness to enter into the undertaking envisaged by it and that the declaration should not be a mere *invitatio ad offerendum.* The *invitatio ad offerendum* does not constitute an offer, but is intended merely to elicit an offer from another party.

In respect of the Internet, the German literature has developed criteria to differentiate between an offer, an offer *ad incertas personas* and a mere *invitatio ad offerendum.* The former problems relating the classification of a statement at web sites as an offer, an *invitatio ad incertas* personas or an *invitatio ad offerendum* is removed since § 312e BGB came into force, which was necessary because of Art. 10 and 11 of the EU-Directive.

3 2 2 1 Web-sites

One former problem was the classification of the purchase of physical goods and the sale of software as an offer, an *offer ad incertas personas*, or an *invitatio ad offerendum.*[506] In case of the purchase of physical goods over the

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[502] Kramer- *Münchener Kommentar* § 145 note 3; Hefermehl- *Erman* § 145 note 2.
[503] Wolf- *Soergel* § 145 note 8.
[504] Enneccerus/ Nipperdey *AT* § 161 I 1b; Heinrichs- *Palandt* § 145 note 1; Kramer- *Münchener Kommentar* § 145 note 7; Hefermehl- *Erman* § 145 note 5; Flume *AT* § 35 I.
[505] Ibid.
[506] Widmer/ Bähler *Electronic Commerce* 42; Scherer/ Butt "Rechtsprobleme bei Vertragsschluß via Internet" *DB* 2000 1012; Taupitz/ Kritter „Electronic Commerce" *Jus* 1999 840; Brinkmann „Vertragsrechtliche Probleme bei der Warenbestellung über Bildschirmtext" *BB* 1981 1183; Micklitz „Verbraucherschutz und Bildschirmtext" *NJW* 1982 266; Lachmann „Ausgewählte Probleme aus dem Recht des Bildschirmtextes" *NJW* 1984 407; Hart- *AK-BGB* § 145 note 21; Marly *Softwareüberlassungsvertrag* (1991) 82; Friedmann 49; Redeker „Geschäftsabwicklung mit externen Rechnern im Bildschirmtextdienst" *NJW* 1984 2390;

Internet, the willingness of the offeror to enter into a commitment by means of his statement and whether a reasonable user of the Internet would interpret the statement as an offer were the decisive factors in determining whether an offer had been made. The prevailing opinion was that the offeror would not wish to find himself in breach of a binding contract to supply goods where he has underestimated the demand. This, however, might occur if a respondent were able to conclude a contract by mere acceptance.[507] The offeror would wish to check his stock before entering into an agreement. For this reason, the display of goods on a web site were classified as an *invitatio ad offerendum* and not as an offer. It was soon realized, however, that different rules needed to apply to the purchase of software or the supply of services or facilities. The prevailing opinion argued that although an offeror could be short of stock, this argument cannot apply to the purchase of software or the supply of services or facilities because the data is not removed from the offeror`s computer, and the original data is therefore always available. Consequently a shortage of stock is impossible.[508] Hence, a statement relating to the purchase of software was characterised as an offer *ad incertas personas*.

This methodological problem has been solved since § 312e BGB became effective. As previously stated, § 312e BGB corresponds to Art. 10 and 11 EU-Directive, which deal with contract formation by a mouse click on web sites. It is now codified in § 312 e BGB that the supplier needs to send an acknowledgement of receipt of the order to the client. As indicated in the discusion of the English common law, it seems reasonable in such a case to presume that because of § 312e BGB the contract will in most cases be concluded by the receipt of acknowledgement of the order. For this reason, it seems that for German law also, almost every statement on a web site will have to be characterised as an *invitatio ad offerendum* because of the disadvantages for the supplier of concluding a binding contract by the mere acceptance of the client.

Brinkmann „Warenbestellung über Bildschirmtext" *BB* 1981 1183, Bultmann/ Rahn „Rechtliche Fragen des Teleshopping" *NJW* 1988 2432 at 2434; Ernst "Der Mausklick als Rechtsproblem – Willenserklärungen im Internet" *NJW-CoR* 1997 165.

[507] Scherer/ Butt "Rechtsprobleme bei Vertragsschluß via Internet" ibid; Taupitz/ Kritter „Electronic Commerce" ibid.

[508] Redeker „Bildschirmtextdienst" *NJW* 1984 2390 at 2391.

3 2 2 2 Electronic mail

In view of the distinction between offer, *invitatio ad offerendum*, and offer *ad incertas personas*, an e-mail message is comparable to a conventional letter. It is therefore necessary to prove the willingness of the offeror to enter into a commitment from an objective point of view.[509] Useful factors in this regard are the number of e-mail messages that are sent to different persons and whether it is reasonable for the offeree to conclude from the wording of the mail that a valid offer exists. Because the offeror requires the e-mail address of the receiver, an e-mail message is, excepting the case of bulk-mails, directed to a special person and in most cases classifiable as an offer. As with the application of the rules of the German BGB to conventional means of communication,however, the circumstances of each specific case must be considered in order to distinguish between an offer, an *invitatio ad offerendum*, and offer *ad incertas personas*.[510]

3 2 3 Time and place of contract

The conclusion of a contract ordinarily requires both offer and acceptance.[511] Both of these declarations need to be given and received in order to be effective.[512] Only in the case of a waiver of receipt of acceptance in accordance with §151 BGB is receipt of a binding declaration of acceptance not a requirement for concluding a contract.

3 2 3 1 Placing of an order on web sites

Another exception to the ordinarily requirements for contract formation is stated in § 312e BGB. In order to correspond to Art. 10 and 11 of the EU-Directive, § 312e BGB stipulates that the supplier is obliged to send an acknowledgement of the order submitted by a client. Because of the EU-Directive, this regulation corresponds exactly to the rule of the English common law. This means that a

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[509] BGBl I 1973 461; Hübner *AT* note 537.
[510] Hübner *AT* note 537; BGBl I 461; Scherer/ Butt „Vertragsschluß via Internet" *DB* 2000 1012.
[511] Medicus *BGB* note 46.
[512] Brox *AT* note 168, 182.

contract by a mouse click on a web site is concluded in most cases at the time and the place where the client is able to access the acknowledgement of receipt.

3 2 3 2 Non- codified forms of contract formation

The formation of contract by means of communication such chatting or e-mailing is not codified in the German Civil Code and the basic rules should therefore be applicable. According to the German Civil Code, a binding contract requires offer and acceptance, which need to be dispatched and then received by the other party.

3 2 3 2 1 Dispatch

Every declaration of intention needs to be dispatched to become effective.[513] A declaration of will is dispatched when the act of declaring is completed and the declaration is intentionally set on its way towards the receiver in such a way that under normal circumstances the receipt thereof can be presumed.[514] In the case of a declaration via the Internet an e-mail message is dispatched by the intentional command to the program to send the message. It is not sufficient that the message is stored in the sender`s e-mail-outbox, or on the computer of his e-mail server with the instruction that it be transmitted at a later stage. For this reason the decisive fact for the dispatch of messages by electronic means of communication is the circumstance that the sender has no further possibility of preventing the message from getting on its way.[515] The time and place of dispatch depends on the time the sender sets his declaration on its way and the location of the computer employed to this end.[516]

In this respect, no differences and problems arise concerning the dispatch of a declaration of intention by electronic means. A problem does arise in case of messages being sent inadvertently, eg where the sender presses the return button without the intention of dispatching the message. This case is

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[513] Schapp *Grundlagen des Bürgerlichen Rechts* (1991); 165; Brox *AT* note 145.
[514] Heinrichs- *Palandt* § 130 note 4.
[515] Koch *Internet Recht* 137; Kuhn *Rechtshandlungen mittels EDV und Telekommunikation* 87.
[516] Kramer- *Münchener Kommentar* Art. 11 EGBGB note 65; Mankowski „ Internet und besondere Aspekte des Internationalen Vertragsrechts (I)"*CR* 1999 586.

comparable to the situation where the sender writes a letter but does not want to send it and this letter is dispatched by another person contrary to his intention. One point of view is that this declaration of intention is valid but voidable.[517] The advantage of this view is that the sender could decide to uphold the validity of the declaration where the declaration is to his advantage. The prevailing opinion holds a different view, however,[518] namely that a declaration which is sent on its way inadvertently does not amount to a valid declaration of intention. This view is based on the argument that the mere dispatch of a declaration of will does not suffice to make it a valid declaration. Another problem could arise in the case of a coded message, when the coded message is sent first and the decoding cipher follows separately. In such a case the dispatch can be presumed to occur at the time when the coded message is sent and not only when the decoding cipher is sent. [519]

3 2 3 2 2 Receipt

To determine the moment of receipt of a declaration and thereby the time and place of contract, it is necessary first to establish the kind of declaration. There are declarations of will which require receipt and those which do not.[520] A declaration of intention which does not require a receipt, eg a public offer of reward, comes into effect at the moment when it is dispatched.[521] In contrast to this, the conclusion of a contract is a bilateral legal transaction which requires the receipt of both the offer and acceptance.[522]

3 2 3 2 2 1 Declaration in the presence or in the absence of the recipient

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[517] Taupitz/ Kritter „Electronic Commerce" *JuS* 1999 840.
[518] BGH LM Nr. 13; BGHZ 65, 13 (14); Heinrichs- *Palandt* § 145 note 4; Hefermehl- *Soergel* §145 note 6; Flume *AT* § 14, 2.
[519] Fritzsche/ Malzer "Ausgewählte zivilrechtliche Probleme elektonisch signierter Willenserklärungen" *DNotZ* 1995 11.
[520] Brox *AT* note 90; Jauernig- *Jauernig* § 104 note 2.
[521] Förschler- *Münchener Kommentar* § 130 note 6; Brox *AT* note 145.
[522] Jauernig- *Jauernig* § 104 note 2; Brox *AT* note 46; Taupitz/ Kritter „Electronic Commerce" *JuS* 1999 840.

To define receipt, it is necessary to distinguish between a declaration in the presence and one in the absence of the recipient. In the case of a declaration in the presence of the receiver, receipt can according to §147 I 2 BGB be presumed when the receiver is correctly informed of the declaration of intention. According to the prevailing opinion it is sufficient if the declaring party has no cause to doubt that the receiving party has understood the message correctly, which means that under normal circumstances he is entitled to presume that the declaration has been received.[523] In contrast to this, a declaration made in the absence of the receiver is, according to §130 I 1 BGB received as soon as it reaches the sphere of influence of the receiving party, for it can then be assumed to have come to the attention of the recipient.

The question that arises, therefore, is whether declarations by electronic means are declarations in the presence or in the absence of the receiving party. Communication by electronic means can be effected by video conferencing, internet telephone or simply by sending an e-mail message. Regarding electronic means of communication, the German literature distinguishes between one-way communication and dialogue-communication in order to classify a declaration for the purposes of receipt.[524]

3 2 3 2 2 1 1 One-way communication

A decisive factor for the classification of declarations is the existence of a situation of conversation or dialogue, which means that the parties are able to communicate with each other without any time delay, including the possibility to ask questions immediately.[525] For this reason those means of communication such as fax, telex and e-mail which do not permit such a conversational

situation, are to be classified as entailing one-way communication.[526] Because of the absence of a conversational situation also, declarations by such means

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[523] Heinrichs- *Palandt* § 130 note 13,14; Jauernig- *Jauernig* § 130 note 3; Larenz *AT* 426.
[524] Heun „Die elektronische Willenserklärung" *CR* 1994 597; Fringuelli/ Wallhäuser "Formerfordernisse beim Vertragsschluß im Internet" *CR* 1999 97; Ernst „Der Mausklick als Rechtsproblem" *NJW-CoR* 1997 166.
[525] Heun „Die elektronische Willenserklärung" *CR* 1994 597.
[526] Widmer/ Bähler *Electronic Commerce* 154; Fringuelli/ Wallhäuser „Vertragsschluß im

are classified as declarations made in the absence of the receiving party.[527] Hence, according to §130 I 1 BGB, one-way communications such a e-mail messages are received when the message reaches the sphere of influence of the receiving party and it can be assumed that the declaration has come to his attention.

The argument that the use of electronic means is as quick as the use of the telephone and that therefore irrespective of the physical location of the parties, the situation is not different from a normal telephone call, cannot justify an analogy with communication by telephone, regulated by §147 I 2 BGB.[528] The wording of §147 I 2 BGB makes it clear that the decisive factor for communication *inter praesentes* is not the mere surmounting of the physical distance by means of a telephone call, but the resultant conversational situation that allows an immediate reaction to a declaration. Hence declarations of intention by one-way communications, even speedy electronic means of one-way communication such as e-mail, are declarations made in the absence of the receiving party subject to §130 I 1 BGB.

3 2 3 2 2 1 2 Dialogue-communication

The deciding characteristic for the distinction under discussion here is a conversational situation.[529] It could be concluded from the term "dialogue-communication" that this necessarily entails a conversational situation. Because of the technical development of computer programs, however, a further distinction has to be made between dialogue-communication between a person and a computer and dialogue-communication between two persons.

In the case of a dialogue situation between a person and a computer, the conversational structure is a result of a prescribed pattern. A computer program is able to answer frequently asked questions or to give pre-fabricated declarations, but only in a way it is programmed to. This means that a

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Internet" *CR* 1999 97; Heun „Die elektronische Willenserklärung" *CR* 1994 597.

[527] Jauernig- *Jauernig* § 130 note 2; Brox- *Erman* § 130 note 9.

[528] Brox- Erman § 130 note 9; Kramer- *Münchener Kommentar* § 147 note 3; Hübner *AT* note 420.

[529] See part 3 para 3 2 3 2 1 1 supra.

computer is unable to register the intention of the other party and to interpret his declaration of intention accordingly.[530] The human party is also unable to establish that his declaration has been understood by his interlocutor. Hence, while the fact that data has been transferred correctly can be established, no attention is paid to the substantive aspect of the declaration.[531] There is no German authority on the subject, but it would seem unreasonable to encumber the declaring party with the risk of a mistaken understanding by the other party in the absence of any possibility to establish this. In the absence of an essential characteristic of a conversational situation, declarations made in the course of communication between a person and a computer should therefore be regarded as declarations between absentee parties and dealt with according to §130 I 1 BGB.[532]

A different situation occurs in the case of a online communication between two persons by means of video conferencing or Internet telephony. Because it is possible to enquire whether a declaration has been understood correctly, §147 I 2 BGB could apply, but the legal position is controversial because of the technical nature of online communication of this kind.

Wallhäuser and Fringuelli hold the opinion that a declaration in the course of online communication between two persons is also a declaration in the absence of the other party and therefore subject to §130 I 1 BGB.[533] The decisive factor for the application of §130 I 1 BGB or §147 I 2 BGB should be the method of declaration and not the possibility to enquire whether the declaration has been correctly understood. Concerning the method of acceptance in German law, it is necessary to distinguish between embodied and unembodied declarations.[534] According to this opinion, these criteria should be taken into account because the declaring party in an oral conversation takes the risk of the understanding of the opposing party. The recipient in such a case has no opportunity to look closely at a document in order to establish the meaning of the declaration.

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[530] Fringuelli/ Wallhäuser „Vertragsschluß im Internet" CR 1999 97.
[531] Heun „Die elektronische Willenserklärung" *CR* 1994 597.
[532] Fringuelli/ Wallhäuser „Vertragsschluß im Internet" *CR* 1999 97; Heun ibid at 597.
[533] Fringuelli/ Wallhäuser ibid at 98.
[534] Dilcher- *Staudinger* § 147 note 2; Hefermehl- *Soergel BGB-Kommentar* § 80 note 3; Hübner *AT* note 418, 419; Brox *AT* note 158, 159; Jauernig- *Jauernig* § 130 note 2.

According to Wallhäuser and Fringuelli, this would be the only chance for the recipient to verify that his understanding of the declaration is correct. In the case of an embodied declaration the less stricter rule for declarations in the absence of the receiver should apply according to §130 I 1 BGB.[535] Therefore the decisive question is whether the declaration is embodied or not, rather than the question whether the declaring party had the chance to enquire about the understanding of the opposing party. Declarations given via an online connection are mostly stored automatically in the system memory of the recipient`s computer and also in the cache memory.[536] This means that incoming online declarations are embodied in these memories and the receiver is able to examine and evaluate the declaration, albeit that the reaction time is very short. The mere fact that the reaction time is short cannot justify an analogy with a normal telephone call, where §147 I 2 BGB is applicable. The declaration between two persons via an online connection is, as previously mentioned, an embodied declaration and accordingly a declaration in the absence of the opposing party so that §130 I 1 BGB should apply. An analogy with a telephone call is only justified where the declaration is not stored in the memory of the recipient's computer so that §147 I 2 BGB should apply.[537]

A similar opinion is held by other authors.[538] According to them, a declaration via an online connection is in fact a declaration in the presence of the recipient, but it is also an embodied declaration when it is stored in a memory. This is also the solution to the problem, according to this view. Although the declaration is made in the presence of the receiving party, the rules of embodied declarations and therefore §130 I 1 BGB should apply. In the final analysis, the result corresponds to the rules relating to declarations in the absence of a party.[539]

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[535] Fringuelli/ Wallhäuser „Vertragsschluß im Internet" *CR* 1999 98.

[536] A memory cache is a portion of memory made of high-speed static RAM (SRAM) instead of the slower dynamic RAM (DRAM) used for the main memory. By keeping as much of informations as possible in SRAM, the computer avoids accessing the slower DRAM. As the microprocessor processes data, it looks first in the cache memory and if it finds the data there, it does not have to do the more time-consuming reading of data from the larger DRAM.

[537] Fringuelli/ Wallhäuser „Vertragsschluß im Internet" *CR* 1999 98.

[538] Fritzsche/ Malzer „Probleme elektonisch signierter Willenserklärungen" *DnotZ* 1995 10; Ernst „Der Mausklick als Rechtsproblem" *NJW-CoR* 1997 166; Taupitz/ Kritter „Electronic Commerce" *JuS* 1999 841; Koch *Internet Recht* 141.

[539] Ernst „Der Mausklick als Rechtsproblem" *NJW-CoR* 1997 166; Taupitz/ Kritter „Electronic

In contrast to this, Heun states that a declaration in an online conversation is a declaration in the presence of the receiver and that §147 I 2 BGB should apply.[540] On this approach, the aim and object of the distinction between a declaration made in the absence of the recipient and one made in his absence, rather than the technical means of communication, is the decisive factor. The aim and object of this distinction is that a declaration in presence is subject to the stricter rule embodied in §147 I 2 BGB because of the possibility to enquire into the correct understanding of the opposing party. For this reason the declaring party should bear the risk of a mistaken understanding. In the case of dialogue-communication between two persons via an online connection, it is possible to enquire into the correctness of the understanding of the opposing party.[541] The technical medium of communication, whether by digitised signals converted into characters (eg chatting over the Internet) or speech (eg video conferencing and Internet telephony) makes no difference.[542] Hence an analogy to a normal telephone call is justified so that §147 I 2 BGB should apply to this case.

3 2 3 2 2 2 Declaration in the presence of the recipient (§ 147 I 2 BGB)

According to the prevailing opinion, a declaration in the presence of the recipient occurs when the digitised message is not stored in any memory of the recipient`s computer and §147 I 2 BGB is accordingly applicable. According to Heun, it is always present in the case of a dialogue-communication between two persons via an online connection.[543] In this case receipt is effected when the receiver is correctly informed about the declaration of intention.[544] However, it is sufficient if the declaring party had no reason to doubt that the declaration has been understood correctly and if receipt under normal circumstances could be presumed.[545] This means that the rules concerning a declaration in the

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Commerce" *JuS* 1999 841.
[540] Heun „Die elektronische Willenserklärung" *CR* 1994 598.
[541] Heun ibid at 597.
[541] Heun ibid at 597.
[542] Heun ibid at 598.
[543] See part 4 para 3 2 3 2 1 2 supra.
[544] Förschler- *Münchener Kommentar* § 130 note 20; Flume *AT* § 14, 3.
[545] Jauernig- *Jauernig* § 130 note 3; Larenz *AT* 426; Brox *AT* note 159.

presence of the recipient via an online connection do not differ from the conventional declaration in the presence of the receiver.

3 2 3 2 2 3 Declaration in the absence of the recipient (§ 130 I 1 BGB)

Declarations in a one-way communication and most declarations in a dialogue-communication can be classified as declarations in the absence of the recipient and thus subject to §130 I 1 BGB.[546] Receipt accordingly occurs when the declaration reaches the sphere of influence of the receiving party so that it can be assumed that the declaration will receive his attention. It needs to be determined therefore, when a declaration made by electronic means enters the sphere of influence of the recipient and when it can be presumed to come to the attention of the recipient.

3 2 3 2 2 3 1 Sphere of influence

A declaration generally enters the sphere of influence of the addressee when objectively speaking the latter has an opportunity to become aware of it.[547] This means that it only needs to pass into a sphere accessible to the receiver.[548] The Supreme Court of the German Reich pointed out that there is no single rule for determining the sphere of influence in all cases. In allocating the risk of the transmission of declarations of intention it is necessary to look at the surrounding circumstances in order to reach a reasonable solution for each case.[549] Because of the technical features of communication by electronic means, including the storage of data on the receiver`s computer or on a third parties computer, a general distinction must be made between a direct and an indirect data transfer.

In the case of a direct transmission, data is transferred from the sender`s computer directly to that of the receiver without any storage on an intervening computer. In this case the declaration reaches a sphere accessible to the

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[546] See part 4 para 3 2 3 2 2 1 2 supra.
[547] Hart- *AK- Kommentar* § 130 note 4; Brox *AT* note 152.
[548] *Brox- Erman* § 130 note 6; Hübner *AT* note 418.
[549] RGZ 99, 23.

recipient when the data crosses the interface to the receiving device. This interface needs to be established in order to determine the sphere of influence of the recipient exactly. The receiving device is the recipient`s mailbox. To reach the mailbox, a digital declaration needs to leave the data-track, which may comprise telephone, satellite and fibre cable nets which belong to neither of the parties. The mail-box on the receiver`s computer belongs to him, so that the interface is situated at the end of the telephone line, where the user's own property begins. This interface is the recipient's telephone socket into which he plugs in his own computer cable. From this stage onwards, the receiver is responsible for the working order of the computer system.[550] This means that the sphere of influence of the recipient in the case of a direct data transfer is reached when the declaration leaves the telephone line and passes beyond the socket into the cable of the receiver's computer.[551]

But according to the definition it is also required that the receiver should from an objective point of view have the opportunity to take notice of the declaration. This requirement is not fulfilled until the message is stored in the system memory of the receiving computer. According to the German literature, there is no receipt where data passes the socket but is not stored in the system memory.[552] Hence storage in the system memory is the decisive circumstance

A different situation occurs in the case of indirect data transfer. Indirect data transfer means that the declaration is sent from the declaring party, not directly to its final destination, but to the computer of an intermediary party. The declaration is stored on this computer and can be retrieved from the computer of the intermediary party by the ultimate recipient. In this situation the sphere of influence of the receiving party could include the computer of the intermediary party. The transferred e-mail message is stored on this computer in the receiver`s mailbox. The situation is basically the same as in the case of the direct data transfer, but the point of receipt is located on a different computer.

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[550] Ebnet "Rechtsprobleme bei der Verwendung von Telefax" *NJW* 1992 2985.
[551] Heun „Die elektronische Willenserklärung" *CR* 1994 598.
[552] Kuhn *Rechtshandlungen mittels EDV* 99; Widmer/ Bähler *Electronic Commerce* 155; Mehrings „Vertragsabscluß im Internet" *MMR* 1998 30 at 33; Fringuelli/ Wallhäuser „Vertragsschluß im Internet" *CR* 1999 99; Heun ibid at 598; Taupitz/ Kritter „Electronic Commerce" *JuS* 1999 841.

The receiving party does not normally get a message from the intermediary party that an e-mail message has arrived. This is the most significant difference between a direct and an indirect data transfer. For this reason, a mailbox on the computer of an intermediary party should only be classified as within the sphere of influence of the receiving party if this party has indicated the mailbox as his receiving device.[553] This can be done by using the e-mail address for business purposes, eg by using calling cards or letterheads indicating his e-mail address.[554] In this case the sphere of influence technically starts at the socket of the computer system of the intermediary party. This legal principle can be justified by the fact that the receiver is responsible for the choice of a reliable e-mail provider. The e-mail provider is able to turn off the computer system, so that the e-mail messages that have arrived are not accessible to the receiver. This risk should be taken by the receiver because he chose the e-mail provider and the sender has no influence over this circumstance.

However, as mentioned above, the opportunity to take notice might be the decisive fact in a particular case. This means that, if the message was stored on the computer system of the e-mail provider, but not accessible, the declaration should nevertheless be regarded as having been received. This risk is taken by the recipient. If, however, the message was not stored because of technical problems, the receiver has no opportunity of taking notice of the message. In this case the declaration should not be deemed to have been be received.[555]

3 2 3 2 2 3 2 Assumption of knowledge

The second requirement for the receipt according to §130 I 1 BGB is that the declaration could be assumed to have come to the attention of the receiving party. This requirement has attracted attention in relation to fax transmissions.

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[553] Koch *Internet Recht* 142; Widmer/ Bähler *Electronic Commerce* 55.
[554] Taupitz/ Kritter „Electronic Commerce" *JuS* 1999 841.
[555] Jauernig- *Jauernig* § 130 note 2; Heinrichs- *Palandt* § 130 note 7; Brox *AT* note 153; Förschler- *Münchener Kommentar* § 130 note 13; Flume *AT* § 14, 3c; Heun „Die elektronische Willenserklärung" *CR* 1994 598.

The legal principles thus established can also be applied to means of communication such as e-mail.[556]

In the case of a direct data transfer it can be assumed that the declaration has come to the recipient`s attention at any time within the working hours of the business.[557] This means that a declaration is received when it enters the receiver`s system or is stored therein within working hours. An exception is made where the recipient uses a computer program that indicates that he takes notice of the declarations outside of working hours.[558] In this case it is not justified to restrict the time of notice to working hours. By using such a computer program, the recipient indicates that he does away with the restriction pertaining to normal working hours. Hence a declaration can in such a case be assumed to have been received at any time.[559] The same legal principle applies to private legal transactions. If a private person established such electronic means for receiving declarations, he renounces the requirement that messages should be received at reasonable times.[560]

In the case of indirect data transfers, a distinction has to be made between the use of a mailbox for business and private purposes. If a mailbox is used for business purposes and an e-mail address is indicated as the receiving device, a businessman is supposed to expect the receipt of declarations during normal business hours.[561] This means that a declaration is received when it reaches the recipient's mailbox irrespective whether the receiver downloads the declaration from the intermediary computer to his own system memory.[562] Because a businessman cannot be expected to receive a declaration after

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[556] Taupitz/ Kritter „Electronic Commerce“ *JuS* 1999 841; Ernst „Der Mausklick als Rechtsproblem“ *NJW-CoR* 1997 162.

[557] Heun „Die elektronische Willenserklärung“ *CR* 1994 598; Ebnet „Telefax“ *NJW* 1992 2990.

[558] Heun ibid.

[559] Heun ibid.

[560] Heun ibid.

[561] Taupitz/ Kritter „Electronic Commerce“ *JuS* 1999 841; Ernst „Der Mausklick als Rechtsproblem“ *NJW-CoR* 1997 162.

[562] RAM is an acronym for random access memory. RAM is the most common type of memory found in computers. In common usage, the term RAM is synonymous with main memory and a type of computer memory that can be accessed randomly, so that any byte of memory can be accessed without touching the preceding bytes. There are two basic types of RAM. As mentioned in footnote the SRAM is used for the memory cache and the DRAM for the main memory.

office hours, a declaration during such a period is deemed to be received at the beginning of office hours on the next day.[563]

If the mailbox is used for private purposes, a different situation obtains. In view of the legal principles developed for the receipt of faxes for private purposes, a declaration is according to the prevailing opinion deemed to be received at the moment the declaration is printed-out.[564] This opinion is justified by the notion that a recipient takes note of a print out immediately on its completion. The result of this is that a private person is supposed to check his fax machine at all times. But this opinion does not take into account that private persons are unable to supervise their fax machine on a continuous basis. Persons who are employed especially, mostly stay at their place of work during the day and are accordingly unable to control their private fax machines at all times. Hence it seems justified to take into account the receiver`s situation when determining a reasonable time for the presumed knowledge on its part. This subtle differentiation regarding the receipt in private matters should also apply in the case of digitised declarations. E-mails that are stored on the computer of an intermediary party need to be downloaded by the receiver. But a private person cannot be supposed to check his e-mail account several times a day. Employed persons are for instance often not allowed to check their private e-mail account at work. Private persons furthermore, pay for each connection to the e-mail provider to check the receipt of declarations. For these reasons a private person cannot be expected to check his e-mail account more than once a day.[565]

To determine the exact time for the assumption of knowledge, two other factors have to be taken into consideration. Firstly, declarations by electronic means can be sent at any time of the day and therefore the receipt cannot be expected at certain times like a postal letter that usually arrives during the morning hours. Secondly, e-mail accounts on the computer of an intermediary party can also be

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[563] Taupitz/ Kritter „Electronic Commerce“ *JuS* 1999 841; Ernst „Der Mausklick als Rechtsproblem“ *NJW-CoR 1997 162.*

[564] Heinrichs- *Palandt Bürgerliches Gesetzbuch* § 130 note 7; Ebnet „Telefax“ *NJW* 1992 2990.

[565] Taupitz/ Kritter „Electronic Commerce“ *JuS* 1999 842, Heun „Die elektronische Willenserklärung“ *CR* 1994 599; Ernst „Der Mausklick als Rechtsproblem“*NJW-CoR* 1997 166; Koch *Internet Recht* 73; Widmer/ Bähler *Electronic Commerce* 152.

requested at any time. This means that a the receiver could check his e-mail account in the morning while a declaration is stored in that account in the afternoon. To reconcile the legal assumption that a private person is supposed to check his account only once a day with the temporal differences between sending and requesting messages, a declaration to a mailbox in private use is deemed to be received the day after it was sent.[566] An exception to this principle is recognized where the receiver takes note of the declaration earlier than can ordinarily be expected. In this case the declaration is received at the actual moment of knowledge.[567]

3 2 4 Frustration of receipt

Hindrances of receipt will in the case of communications by electronic means mostly occur as a result of a malfunctioning of the receiving device. Such a malfunction can be caused deliberately or accidentally. A failure to top up the paper in a fax machine in order to prevent the receipt of declarations is an example of a deliberate malfunction.[568] The German courts have decided that in such a case the declarations are deemed to have been received without the actual knowledge of the receiver.[569] In view of digitised declarations like e-mail messages, the receiver can prevent receipt intentionally by blocking his e-mail account to a particular sender of a declaration. This e-mail message would not be stored in the account, but sent back to its original device. Another possibility of a deliberate malfunction is an overcrowding of the e-mail account by the recipient himself. This would have the same effect and the declaration would be sent back. The receiver is unable to receive further e-mail messages and the resolution of the hindrance is within his exclusive control. These hindrances to receipt are comparable to the omission to top up the paper in a fax machine and should be handled in the same way. Hence, in the case of an deliberate malfunction of the receiving device, the declaration of intention is deemed to be

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[566] Ernst „Der Mausklick als Rechtsproblem“ *NJW-CoR* 1997 166, Taupitz/ Kritter „Electronic Commerce“*JuS* 1999 842.
[567] Heinrichs- *Palandt* § 103 note 5.
[568] Förschler- *Münchener Kommentar* § 130 note 28.
[569] BGH *NJW* 83 930; LG Hamm *ZIP* 1993 1109; OLG Karlsruhe *NJW* 73 1611.

received at the moment that the sender attempted unsuccessfully to transmit the declaration.[570]

The hindrance of receipt of an digitised declaration can also be caused accidentally by the disregard of a duty to take care. Such a negligent act could entail the omission to delete old e-mail messages in order to obtain more storage capacity. If an e-mail message could not be stored in the receivers e-mail account because of a lack of storage capacity, the declaration cannot be regarded as received. The receiver has no opportunity to take notice of the message and he did not prevent the receipt intentionally. This means that the declaration is received at the moment that the messages enter the sphere of influence of the receiving party. To compensate for this advantage to the addressee, he is not allowed to rely on the message being delayed. For this reason the declaration, once it has entered the sphere of the receiving party, is retrospectively deemed to be effective according to § 242 BGB from the moment that the sender tried to transmit the declaration for the first time.[571]

3 2 5 Revocation of declarations by electronic means

According to §130 I 2 BGB a declaration can be revoked at any stage until it is received. As indicated above, the time of receipt of declarations by electronic means depends on the type of communication.[572] This means that as regards the revocation of the declaration, a distinction must be drawn between one-way and dialogue communication.

A declaration sent as a one-way communication is according to §130 I 1 BGB received when the declaration enters the sphere of influence of the receiving party and the attention of the recipient concerning the declaration can be assumed. The legal principle for a revocation which is laid down by §130 I 2 BGB differs slightly from this definition. The word "receipt" in §130 I 2 BGB

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[570] RG 58 408; BGH NJW 83 931; Förschler- *Münchener Kommentar* § 130 note 28; Jauernig- *Jauernig* § 130 note 6; Hart- *AK- Kommentar* § 130 note 9; Brox- *Erman* § 130 note 24; Hübner *AT* note 424; Taupitz/ Kritter „Electronic Commerce" *JuS* 1999 842.

[571] RGZ 58 408; BGH *NJW* 1998 977; BGH *NJW* 1996 1968; Förschler- *Münchener Kommentar* § 130 note 28; Hart- *AK- Kommentar* § 130 note 9; Brox- *Erman* § 130 note 24.

[572] See part 4 para 3 2 3 2 2 supra.

means the actual knowledge of the receiver and not an assumption that the declaration has come to his attention.[573] This differentiation is justified by the legal protection of *bona fide* acts. The recipient cannot rely on a declaration until he has actually taken note of it. The legal protection of *bona fide* acts is only justified once the receiver has taken notice of the declaration. This means that a declaration remains revocable until the receiving party takes notice of the declaration.[574] A revocation of an e-mail message, using the same mean of communication, is accordingly effective, if the revocation is stored in the system memory prior to the receiver reading the original message.[575]

A declaration sent in a dialogue communication must be judged differently. The development of a fast communication system like the Internet with high speed modems or ISDN connections, allows communication in real time. Hence in the case of dialogue communications like video conferencing or online chatting, the time of the dispatch of a declaration is also the time of its receipt. For this reason, a revocation of a declaration in dialogue communication is impossible and the declaration is effective once it is dispatched.[576]

3 2 6 Defective transmission of declarations and deficiencies of intention

Electronic means of communication do not always work properly. The sphere of influence of the sender ends when the declaration leaves the sending device, whereas the sphere of influence of the receiver only starts when the declaration enters the receiving device.[577] The transmission between these two spheres of influence is entrusted to the owner of the telephone, satellite and fibre cable nets resorted to in a particular case. This supplier can be seen as a servant in the sense of §120 BGB. Accordingly, a declaration that is transmitted defectively can be nullified.[578] The nullification does not in German law require

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[573] RGZ 60 334; 91 61 (62); BGH *NJW* 75 384; von Thur *AT* § 71 III 6; Larenz *AT* 420; Jauernig- *Jauernig* § 130 note 7; Heinrichs- *Palandt* § 130 note 11; Brox- *Erman* § 130 note 15

[574] Ibid.

[575] Fringuelli/ Wallhäuser „Vertragsschluß im Internet" *CR* 1999 99; Heun „Die elektronische Willenserklärung" *CR* 1994 599; Koch *Internet Recht* 146.

[576] Fringuelli/ Wallhäuser ibid; Heun ibid.

[577] See part 4 para 3 2 3 2 2 3 1 supra.

[578] Fritzsche/ Malzer „Probleme elektonisch signierter Willenserklärungen" *DnotZ* 1995 13.

a written form and can accordingly be effected by the use of electronic means of communication.[579]

Part 5: Conclusion

It must be emphasised that initiatives such as the EU-Directive or the ETC do not solve all problems of contract formation relating to e-commerce. The EU-Directive has abstained from prescribing a theory of contract formation. Only Art. 11 of the EU-Directive deals precisely with the placing of an order via mouse click on web sites. The ETC contains more details than the EU-Directive concerning the contract formation itself. For the non-codified means of communication, the basic rules are still applicable, and in general, the problems of contract formation on the Internet can be solved by the application of the conventional law of contract. The basic rules are at least comprehensive enough to handle the presently recognised problems, even though it is at times necessary to interpret the rules in an extensive manner.

Statements on web sites could under English, South African, and German law can in general be characterised as invitations to treat. In English and German law, this results from the risk to the supplier of being held liable to fulfil all obligations, resulting from an enormous number of contracts and a depletion of stock. As Art. 11 EU-Directive forces the supplier to send an acknowledgement of receipt to the client, it seems reasonable to presume that the contract will in most cases be concluded not by the declaration of the client, but rather by the acknowledgement of the receipt of an order. In South African law, this is the result of the application of the conventional rules. The application of the South African rules to this matter is by far more complicated than the English and German legal position. In respect to the similar result there is no need for reform of English, South African, or German law concerning this matter.

The legal situation concerning e-mail messages is handled in a similar way by English, South African, and German law. With respect to the distinction

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[579] Koch *Internet Recht* 147.

between an offer and an invitation to treat, e-mail messages correspond more to conventional letters. Communication via e-mail messages, in contrast to the situation on web sites, requires that the sender knows the receiver's e-mail address. The characterisation of e-mail messages as either an offer or an invitation to do business should therefore be dealt with as is done in the case of ordinary letters. In these cases, the wording of the letter and the surrounding circumstances are decisive. A different situation occurs in the case of bulk mail, which is more nearly akin to an advertising brochure than a single e-mail and should therefore be regarded as an invitation to treat and not as an offer

Of great concern is the regulation concerning the time and place of contracting in the various national systems. Because of Art 11 EU-Directive, there is a need for a distinction between a contract formation on web sites and other electronic means of communication such as e-mailing, chatting, etc. While Art. 11 of the EU-Directive applies to this special case, the ETC regulates the contract formation in general. Apart from the methods of determining making and receipt of binding declarations, the main difference is the requirement of an acknowledgement of receipt in English and German law and in accordance with the EU-Directive. The South African legislation settled this rule in Art. 27 (1) ETC, where it is stated that the acknowledgement of receipt is not necessary for conclusion of contract. This seems to be based on Art. 14 UNCITRAL Model Law, where it is settled that the use of functional acknowledgements is a business decision to be made by users of e- commerce and therefore not necessary to give legal effect to data message. The lack of an obligation to send an acknowledgement simplifies the contract formation on web sites, and it further exempts the offeror from organisational and technical problems of sending an acknowledgement of every single receipt. On the other hand, the EU-Directive is advantageous for the offeree. By receiving the acknowledgement of receipt he can be sure that his offer was received and accepted by the offeror. The solution offered by the EU-Directive seems to complicate the proceeding of contract formation where the supplier stipulates that a contract comes into force with the receipt of his acknowledgement of the order, but it, in fact, protects the client in a reasonable manner. Because of its nature, the Internet do not allow for personal contact between the parties, and

the offeror is often not aware of the location of the offeree. If the offeree does not receive an acknowledgement of receipt, the formation of a binding contract is uncertain for him until the offeror fulfils his obligation. In respect to the novelty of e-commerce and the inexperience of many Internet users, the solution offered by the EU-Directive seems to be preferable.

Other means of communication than a mouse click on web sites reveal the basic differences in the legal principles concerning the determination of the time and place of contracting. It results in differences between English law, South African law, and the German approach to contract formation on the Internet. Only the distinction between one-way and two-way (or dialogue) communication is made in the same way. In English and South African law, two-way communication such as chatting or video conferencing should be regarded as an instantaneous means of communication *inter praesentes*. This means that the postal rule should not apply to these means of communication. In English law, the time and place of contract in the case of two-way communication is determined by the offeree becoming aware of the acceptance. For South African law, the information theory should be applicable in this case in accordance with the basic rules. A novelty is stated in Art. 23 (2), 24 (a) (b), 27 (1) ETC, where it is only required that the message enters an information system and is capable of being retrieved. With respect to the technical structure of the Internet, there is no appreciable difference between English and South African law in the case of two-way communication as the addressee perceives the data message as soon as it enters his information system.

In English common law, the determination of time and place of contract through one-way communication like e-mail message is problematic. The reasons given by the court for the application of the postal rule for conventional letters are also applicable to the use of e-mail messages, but the counter arguments are also applicable. The historical reasoning of the postal rule is not fully comparable to the e-mail message system, and there are as yet no cases concerning this issue. This means that the arguments upon which the postal rule is based are insufficient to justify an application of the rule to e-mail messages. Hence, the rule cannot simply be transferred to such forms of

communication. Although English and South African scholars equate e-mail messages with an instantaneous means of communication such as the telephone, they do not present irrebuttable reasons for this conclusion either. In this case the determination of the time and place of contract should be established with reference to the actual nature of the technical process involved. The analysis suggests a differentiated approach, with the postal rule being applicable in some, but not all of the cases considered. A similar conclusion can be drawn by the application of the South African basic rules. Only the application of the ETC leads to a different solution. According to Art 23 (2), 24 (b), 27 (1) ETC, the postal rule does not apply to any communication via the Internet, but the receipt is the decisive factor for data messages. This regulation standardizes the interpretation of statements made using different electronic means of communication, and a simplification is reached concerning the time and place of contracting. The South African regulation seems to favour the parties by its standardised regulation. Reform is therefore indicated along the lines of English law. It therefore seems reasonable to base a reform on the UNCITRAL Model Law. This would lead to a similar situation concerning the time and the place of contracting as in other states like South Africa or the United States.

The German approach of contract formation on the Internet, excepting web sites, is somewhat more complicated and uncertain than the regulation of the UNCITRAL Model law and the ETC. In German civil law, the "declaration of intention" is the most important legal concept relevant to the conclusion of contract. A valid contract comes into being in German law when a declaration of intention is made and received. The determination of time and place of contracting is further characterized by the distinction between a declaration in the presence or in the absence of the recipient. Furthermore, embodied and unembodied declarations are treated differently. In accordance with the prevailing legal opinion, § 130 I BGB applies to one-way communication and embodied declarations in two-way communication. A declaration is therefore deemed to be received when it enters the sphere of influence of the recipient, and the knowledge of the recipient of the declaration of intention can be assumed. Only an unembodied declaration which is not stored on the receiver`s computer has its receipt determined in accordance with §147 I 2

BGB. In such a case, the receipt of the declaration is presumed to have taken place when the receiver is correctly informed about the declaration of intention. It should also be sufficient if the declaring party has no cause to doubt the proper understanding of the receiving party. The German approach to contract formation by electronic means of communication seems to be too complicated. This legislation should be changed to reflect the regulations set forth in the UNCITRAL Model Law. It seems to be reasonable to introduce a regulation into the German Civil Code, which clearly determines the time and place of receipt. In respect to the novelty of the Internet as a means of communication, there is a need to state the requirements for receipt of data messages. This would lead to a simplification in dealing with contract formation on the Internet. The change in the legislation should reflect the regulations found in Art. 15 UNCITRAL Model Law, which would standardise the German law in accordance with international law systems.

An increasing number of states is changing their national legislation with respect to e-commerce to reflect the UNCITRAL Model Law. A standardisation and therefore a simplification could be reached in both English common law and the German Civil Code with regard to contract formation in e-commerce by adopting the regulation found in Art. 15 UNCITRAL Model Law. This change would lead to a reasonable structure of contract formation in e-commerce under national law and with respect to the borderless nature of the Internet, it would simplify the formation of international contracts. It should be borne in mind that this is the very essence of the Internet with its over 200 million users.